



# **Federal Aviation Administration**

## **Office Of The Chief Counsel**

### **Office Of Dispute Resolution For Acquisition (ODRA)**

## **THE ODRA GUIDE**

### **A Guide to the Conduct of Protests and Contract Disputes**

**Issue 2003-1**

***THIS GUIDE IS NOT A REGULATION –***

***IT IS NON-BINDING INFORMATION FOR USE BY THE PUBLIC –***

***IN THE EVENT THAT THERE IS A CONFLICT BETWEEN THIS GUIDE AND  
THE ODRA REGULATIONS, THE REGULATIONS WILL CONTROL.***

#### ***Table of Contents:***

- [Introduction](#)
  - [Organization of this Guide](#)
    - [Alternative Dispute Resolution](#)
    - [Default Adjudicative Process](#)
    - [Protective Orders](#)
  - [Procedural Timelines](#)
  - [Contacts and Filings](#)
  - [Procedural Regulations](#)
  - [Transportation Security Administration](#)
  - [Alternative Dispute Resolution](#)
  - [Default Adjudication Process](#)
  - [Protective Orders](#)
  - [Guidance for the Use of Binding Arbitration](#)
  - [Aviation and Transportation Security Act](#)
  - [Model Protective Order](#)
-

## INTRODUCTION

This Office of Dispute Resolution for Acquisition (ODRA) Guide to protest and contract dispute procedures is intended to help you to prepare for and participate in the ODRA dispute resolution process. The Guide is intended to inform you about the process, and to provide model documents for your use, where appropriate. Following the information in the Guide will facilitate resolving protests or contract disputes as efficiently as possible. The contents of this Guide are updated periodically to account for changing requirements, or to provide additional guidance as needed.

The ODRA Procedural Rules, which took effect on June 28, 1999, detail the procedural requirements for the resolution of both bid protests and contract disputes. See [ODRA Procedural Rules](#). The entirety of the [FAA's Acquisition Management System \(AMS\)](#) and other acquisition guidance may be accessed within the [FAA Acquisition System Toolset \(FAST\)](#). Under [Delegation dated September 16, 2002](#), the ODRA applies the AMS and its Procedural Rules in providing dispute resolution services to the [Transportation Security Administration](#).

---

## ORGANIZATION OF THIS GUIDE

This Guide is organized into topics. Each topic represents an aspect of the ODRA dispute resolution process. These topics are described briefly below. More complete descriptions may be accessed by hyperlink.

### TOPIC 1: [ALTERNATIVE DISPUTE RESOLUTION](#)

Alternative dispute resolution (ADR) is a consensual dispute resolution approach under which the parties try to arrive at a mutually satisfactory solution to their differences without resorting to litigation. ADR has been endorsed by the White House, and Congress has passed laws encouraging the use of ADR by federal agencies, including the FAA. On June 17, 1999, the FAA Associate Administrator for Research and Acquisitions and FAA Acquisition Executive executed a [Pledge](#) to utilize ADR for the resolution of procurement related controversies. The ODRA dispute resolution process emphasizes the voluntary use of ADR as the primary means of dispute resolution for protests and contract disputes. The ODRA makes its Dispute Resolution Officers and other qualified individuals available as ADR neutrals, with the concurrence of the parties. There are many available methods of ADR. The choice of ADR methods and of the ADR neutral who will serve as a mediator, facilitator, or arbitrator, is completely within the control of the parties. The Alternative Dispute Resolution section of this Guide describes ADR at the ODRA and contains links to model ADR agreements that can be used to establish groundrules for the resolution of your case through ADR. You may modify the model agreements to suit the needs of your case.

### TOPIC 2: [THE DEFAULT ADJUDICATIVE PROCESS](#)

When parties are not able to resolve their differences in a non-adversarial way, by means of informal communications or ADR, the ODRA provides an efficient Default Adjudicative Process, under which a Dispute Resolution Officer (DRO) or Special Master is appointed to develop and review the record of the facts surrounding the dispute. The DRO or Special Master makes factual findings and recommendations for final Agency action to the Administrator of the FAA, through the Director of the ODRA.

### **TOPIC 3: [PROTECTIVE ORDERS](#)**

The resolution of protests and contract disputes is normally a matter of public record. In pursuing a protest or contract dispute, a party or the ODRA may have to refer to and rely on confidential proprietary information that may be harmful to your company, if publicly released. Under ODRA procedures, any participant may request entry of a protective order. The ODRA may also determine on its own to issue such an order. A protective order limits the number of persons who can have access to this kind of commercially sensitive information, and requires that such people not be involved in any way in competitive decision making. The Guide provides a model protective order, together with the ODRA's standard application forms for admission under a protective order. These model documents can be altered to suit a particular dispute, with the concurrence of the ODRA.

- [ALTERNATIVE DISPUTE RESOLUTION](#)
  - [THE DEFAULT ADJUDICATIVE PROCESS](#)
  - [PROTECTIVE ORDERS](#)
- 

### **PROCEDURAL TIMELINES**

For your convenience and ease of understanding, the ODRA has developed Procedural Timeline charts for both Protests and Contract Disputes.

[CLICK HERE TO ACCESS THE TIMELINE CHARTS](#)

---

### **SEARCH THE ODRA WEBSITE**

A word search of the ODRA casefile and all other documents within the ODRA website may be performed through the new FAA homepage search engine. In the search box, simply enter the desired keyword(s), e.g., "timeliness," "interested party," "protective order," "bait and switch," etc. You may also wish to utilize the ODRA casefile Topical Index, or, if you already know the name(s) of the ODRA case(s) you wish to access, you may use the index entitled "Cases By Name of Complainant."

- [THE TOPICAL INDEX](#)
  - [CASES BY NAME OF COMPLAINANT](#)
- 

## FEEDBACK: HOW WE LEARN

Each participant in the ODR process is invited to use the attached feedback form to submit comments or suggestions on the Guide and any sample document, or any other aspect of this Website. Your feedback will prove invaluable for reviewing and improving the Website and the ODR's dispute resolution system. To contact the ODR office, see "Contact & Filing Information."

- [ACCESS CONTACT & FILING INFORMATION](#)
  - [RETURN TO THE TOP OF THIS PAGE](#)
  - [RETURN TO THE GUIDE INTRODUCTION](#)
- 
- 

## ODR PROCEDURAL REGULATIONS

The following contains the FAA's responses to comments on the proposed procedural rules for the FAA Office of Dispute Resolution for Acquisition (ODR) that was published in the Federal Register on August 26, 1998 as well as the final procedural rules, all as published in the Federal Register on June 18, 1999 (and as corrected in the Federal Register on August 31, 1999). The final rule, which took effect on June 28, 1999, specifies procedures for bid protests and contract disputes under new Part 17 of Title 14 of the Code of Federal Regulations (CFR). For ease in locating a specific rule section pertaining to protests or contract disputes, you may wish to use the following Index for Part 17, where we have installed some helpful hyperlinks.

### PART 17 - PROCEDURES FOR PROTESTS AND CONTRACT DISPUTES

#### Subpart A - General

Sec.

[17.1](#) Applicability.

[17.3](#) Definitions.

[17.5](#) Delegation of authority.

[17.7](#) Filing and computation of time.

[17.9](#) Protective orders.

### **Subpart B - Protests**

[17.11](#) Matters not subject to protest.

[17.13](#) Dispute resolution process for protests.

[17.15](#) Filing a protest.

[17.17](#) Initial protest procedures.

[17.19](#) Dismissal or summary decision of protests.

[17.21](#) Protest remedies.

### **Subpart C - Contract Disputes**

[17.23](#) Dispute resolution process for contract disputes.

[17.25](#) Filing a contract dispute.

[17.27](#) Submission of joint or separate statements.

[17.29](#) Dismissal or summary decision of contract disputes.

### **Subpart D - Alternative Dispute Resolution**

[17.31](#) Use of alternative dispute resolution.

[17.33](#) Election of alternative dispute resolution process.

[17.35](#) Selection of neutrals for the alternative dispute resolution process.

### **Subpart E - Default Adjudicative Process**

[17.37](#) Default adjudicative process for protests.

**17.39 Default adjudicative process for contract disputes.**

**Subpart F - Finality and Review**

**17.41 Final orders**

**17.43 Judicial review.**

**17.45 Conforming amendments.**

**APPENDIX A TO PART 17 - ALTERNATIVE DISPUTE RESOLUTION (ADR)**

**Authority: 5 U.S.C. 570 – 581, 49 U.S.C. 106(f)(2), 40110, 40111, 40112, 46102, 46014, 46105, 46109, and 46110.**

**Subpart A - General**

**§ 17.1 Applicability.**

**This part applies to all protests or contract disputes against the FAA that are brought on or after the effective date of these regulations, with the exception of those contract disputes arising under or related to FAA contracts entered into prior to April 1, 1996.**

**§ 17.3 Definitions.**

**(a) Accrual means to come into existence as a legally enforceable claim.**

**(b) Accrual of a contract claim means that all events relating to a claim have occurred which fix liability of either the government or the contractor and permit assertion of the claim, regardless of when the claimant actually discovered those events. For liability to be fixed, some injury must have occurred. Monetary damages need not have been incurred, but if the claim is for money, such damages must be capable of reasonable estimation. The accrual of a claim or the running of the limitations period may be tolled on such equitable grounds as where the Office of Dispute Resolution for Acquisition determines that there has been active concealment or fraud or where it finds that the facts were inherently unknowable.**

**(c) Acquisition Management System (AMS) establishes the policies, guiding principles, and internal procedures for the FAA's acquisition system.**

**(d) Administrator means the Administrator of the Federal Aviation Administration.**

**(e) Alternative Dispute Resolution (ADR) is the primary means of dispute resolution that**

would be employed by the FAA's Office of Dispute Resolution for Acquisition. See Appendix A of this part.

(f) **Compensated Neutral** refers to an impartial third party chosen by the parties to act as a facilitator, mediator, or arbitrator functioning to resolve the protest or contract dispute under the auspices of the Office of Dispute Resolution for Acquisition. The parties pay equally for the services of a Compensated Neutral, unless otherwise agreed to by the parties. A Dispute Resolution Officer (DRO) or Neutral cannot be a Compensated Neutral.

(g) **Contract Dispute**, as used in this part, means a written request to the Office of Dispute Resolution for Acquisition seeking resolution, under an existing FAA contract subject to the AMS, of a claim for the payment of money in a sum certain, the adjustment or interpretation of contract terms, or for other relief arising under, relating to or involving an alleged breach of that contract. A contract dispute does not require, as a prerequisite, the issuance of a Contracting Officer final decision. Contract disputes for purposes of ADR only may also involve contracts not subject to the AMS.

(h) **Default Adjudicative Process** is an adjudicative process used to resolve protests or contract disputes where the parties cannot achieve resolution through informal communication or the use of ADR. The Default Adjudicative Process is conducted by a DRO or Special Master selected by the Office of Dispute Resolution for Acquisition to serve as "adjudicative officers," as that term is used in 14 CFR Part 14.

(i) **Discovery** is the procedure where opposing parties in a protest or contract dispute may, either voluntarily or to the extent directed by the Office of Dispute Resolution for Acquisition, obtain testimony from, or documents and information held by, other parties or non-parties.

(j) **Dispute Resolution Officer (DRO)** is a licensed attorney reporting to the Office of Dispute Resolution for Acquisition. The term DRO can include the Director of the Office of Dispute Resolution for Acquisition, Office of Dispute Resolution for Acquisition staff attorneys or other FAA attorneys assigned to the Office of Dispute Resolution for Acquisition.

(k) **An interested party**, in the context of a bid protest, is one whose direct economic interest has been or would be affected by the award or failure to award an FAA contract. Proposed subcontractors are not "interested parties" within this definition and are not eligible to submit protests to the Office of Dispute Resolution for Acquisition.

(l) **An intervenor** is an interested party other than the protester whose participation in a protest is allowed by the Office of Dispute Resolution for Acquisition. For a post-award protest, the awardee of the contract that is the subject of the protest shall be allowed, upon request, to participate as an intervenor in the protest. In such a protest, no other interested

parties shall be allowed to participate as intervenors.

(m) Neutral refers to an impartial third party in the ADR process chosen by the Office of Dispute Resolution for Acquisition to act as a facilitator, mediator, arbitrator, or otherwise to resolve a protest or contract dispute. A Neutral can be a DRO or a person not an employee of the FAA who serves on behalf of the Office of Dispute Resolution for Acquisition.

(n) The Office of Dispute Resolution for Acquisition (ODRA), under the direction of the Director, acts on behalf of the Administrator to manage the FAA Dispute Resolution Process, and to recommend action to the Administrator on matters concerning protests or contract disputes.

(o) Parties include the protester(s) or (in the case of a contract dispute) the contractor, the FAA, and any intervenor(s).

(p) Product Team, as used in these rules, refers to the FAA organization(s) responsible for the procurement activity, without regard to funding source, and includes the Contracting Officer (CO) and assigned FAA legal counsel, when the FAA organization(s) represent(s) the FAA as a party to a protest or contract dispute before the Office of Dispute Resolution for Acquisition. The CO is responsible for all Product Team communications with and submissions to the Office of Dispute Resolution for Acquisition through assigned FAA counsel.

(q) Screening Information Request (SIR) means a request by the FAA for documentation, information, presentations, proposals, or binding offers concerning an approach to meeting potential acquisition requirements established by the FAA. The purpose of a SIR is for the FAA to obtain information needed for it to proceed with a source selection decision and contract award.

(r) A Special Master is an attorney, usually with extensive adjudicative experience, who has been assigned by the Office of Dispute Resolution for Acquisition to act as its finder of fact, and to make findings and recommendations based upon AMS policy and applicable law and authorities in the Default Adjudicative Process.

## **§ 17.5 Delegation of authority.**

(a) The authority of the Administrator to conduct dispute resolution proceedings concerning acquisition matters, is delegated to the Director of the Office of Dispute Resolution for Acquisition.

(b) The Director of the Office of Dispute Resolution for Acquisition may redelegate to Special Masters and DROs such delegated authority in paragraph (a) of this section as is deemed



necessary by the Director for efficient resolution of an assigned protest or contract dispute, including the imposition of sanctions or other disciplinary actions.

#### **§ 17.7 Filing and computation of time.**

(a) Filing of a protest or contract dispute may be accomplished by mail, overnight delivery, hand delivery, or by facsimile. A protest or contract dispute is considered to be filed on the date it is received by the Office of Dispute Resolution for Acquisition during normal business hours. The Office of Dispute Resolution for Acquisition's normal business hours are from 8:30 A.M. to 5:00 P.M. EST or EDT, whichever is in use. A protest or contract dispute received via mail, after the time period prescribed for filing, shall not be considered timely filed even though it may be postmarked within the time period prescribed for filing.

(b) Submissions to the Office of Dispute Resolution for Acquisition after the initial filing of a contract dispute may be accomplished by any means available in paragraph (a). Submissions to the Office of Dispute Resolution for Acquisition after the initial filing of a protest may only be accomplished by overnight delivery, hand delivery or facsimile.

(c) The time limits stated in this part are calculated in business days, which exclude weekends and Federal holidays. In computing time, the day of the event beginning a period of time shall not be included. If the last day of a period falls on a weekend or a Federal holiday, the first business day following the weekend or holiday shall be considered the last day of the period.

#### **§ 17.9 Protective orders.**

(a) The Office of Dispute Resolution for Acquisition may issue protective orders addressing the treatment of protected information, either at the request of a party or upon its own initiative. Such information may include proprietary, confidential, or source-selection-sensitive material, or other information the release of which could result in a competitive advantage to one or more firms.

(b) The terms of the Office of Dispute Resolution for Acquisition's standard protective order may be altered to suit particular circumstances, by negotiation of the parties, subject to the approval of the Office of Dispute Resolution for Acquisition. The protective order establishes procedures for application for access to protected information, identification and safeguarding of that information, and submission of redacted copies of documents omitting protected information.

(c) After a protective order has been issued, counsel or consultants retained by counsel appearing on behalf of a party may apply for access to the material under the order by submitting an application to the Office of Dispute Resolution for Acquisition, with copies furnished simultaneously to all parties. The application shall establish that the applicant is

**not involved in competitive decisionmaking for any firm that could gain a competitive advantage from access to the protected information and that the applicant will diligently protect any protected information received from inadvertent disclosure. Objections to an applicant's admission shall be raised within two (2) days of the application, although the Office of Dispute Resolution for Acquisition may consider objections raised after that time for good cause.**

**(d) Any violation of the terms of a protective order may result in the imposition of sanctions or the taking of the actions as the Office of Dispute Resolution for Acquisition deems appropriate.**

**(e) The parties are permitted to agree upon what material is to be covered by a protective order, subject to approval by the Office of Dispute Resolution for Acquisition.**

### **Subpart B - Protests**

#### **§ 17.11 Matters not subject to protest.**

**The following matters may not be protested before the Office of Dispute Resolution for Acquisition:**

**(a) FAA purchases from or through, state, local, and tribal governments and public authorities;**

**(b) FAA purchases from or through other federal agencies;**

**(c) Grants;**

**(d) Cooperative agreements;**

**(e) Other transactions which do not fall into the category of procurement contracts subject to the AMS.**

#### **§ 17.13 Dispute resolution process for protests.**

**(a) Protests concerning FAA SIRs or contract awards shall be resolved pursuant to this part.**

**(b) The offeror initially should attempt to resolve any issues concerning potential protests with the CO. The CO, in coordination with FAA legal counsel, will make reasonable efforts to answer questions promptly and completely, and, where possible, to resolve concerns or**

**controversies.**

**(c) Offerors or prospective offerors shall file a protest with the Office of Dispute Resolution for Acquisition in accordance with §17.15. The protest time limitations set forth in §17.15 will not be extended by attempts to resolve a potential protest with the CO. Other than the time limitations specified in §17.15 for the filing of protests, the Office of Dispute Resolution for Acquisition retains the discretion to modify any time constraints imposed in connection with protests.**

**(d) In accordance with §17.17, the Office of Dispute Resolution for Acquisition shall convene a status conference for the protest. Under the procedures set forth in that section, the parties generally will either decide to utilize Alternative Dispute Resolution (ADR) techniques to resolve the protest, pursuant to Subpart D of this part, or they will proceed under the Default Adjudicative Process set forth in Subpart E of this part. However, as provided in §17.31 (c), informal ADR techniques may be utilized simultaneously with ongoing adjudication.**

**(e) The Office of Dispute Resolution for Acquisition Director shall designate Dispute Resolution Officers (DROs) or Special Masters for protests.**

**(f) Multiple protests concerning the same SIR, solicitation, or contract award may be consolidated at the discretion of the Office of Dispute Resolution for Acquisition, and assigned to a single DRO or Special Master for adjudication.**

**(g) Procurement activities, and, where applicable, contractor performance pending resolution of a protest shall continue during the pendency of a protest, unless there is a compelling reason to suspend or delay all or part of the procurement activities. Pursuant to §§17.15(d) and 17.17(b), the Office of Dispute Resolution for Acquisition may recommend suspension of award or delay of contract performance, in whole or in part, for a compelling reason. A decision to suspend or delay procurement activities or contractor performance would be made in writing by the FAA Administrator or the Administrator's delegee.**

## **§ 17.15 Filing a protest.**

**(a) Only an interested party may file a protest, and shall initiate a protest by filing a written protest with the Office of Dispute Resolution for Acquisition within the times set forth below, or the protest shall be dismissed as untimely:**

**(1) Protests based upon alleged improprieties in a solicitation or a SIR that are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for the receipt of initial proposals.**

**(2) In procurements where proposals are requested, alleged improprieties that do**

not exist in the initial solicitation, but which are subsequently incorporated into the solicitation, must be protested not later than the next closing time for receipt of proposals following the incorporation;

(3) For protests other than those related to alleged solicitation improprieties, the protest must be filed on the later of the following two dates:

(i) Not later than seven (7) business days after the date the protester knew or should have known of the grounds for the protest; or

(ii) If the protester has requested a post-award debriefing from the FAA Product Team, not later than five (5) business days after the date on which the Product Team holds that debriefing.

(b) Protests shall be filed at:

(1) Office of Dispute Resolution for Acquisition, AGC-70,  
Federal Aviation Administration  
800 Independence Avenue, S.W., Room 323  
Washington, DC 20591  
Telephone: (202) 267-3290, Facsimile: (202) 267-3720  
[as changed per 67 FR 71607, December 2, 2002]; or

(2) Other address as shall be published from time to time in the Federal Register.

(c) A protest shall be in writing, and set forth:

(1) The protester's name, address, telephone number, and facsimile (FAX) number;

(2) The name, address, telephone number, and FAX number of a person designated by the protester (Protester Designee), and who shall be duly authorized to represent the protester, to be the point of contact;

(3) The SIR number or, if available, the contract number and the name of the CO;

(4) The basis for the protester's status as an interested party;

(5) The facts supporting the timeliness of the protest;

(6) Whether the protester requests a protective order, the material to be

**protected, and attach a redacted copy of that material;**

**(7) A detailed statement of both the legal and factual grounds of the protest, and attach one (1) copy of each relevant document;**

**(8) The remedy or remedies sought by the protester, as set forth in §17.21;**

**(9) The signature of the Protester Designee, or another person duly authorized to represent the protester.**

**(d) If the protester wishes to request a suspension or delay of the procurement, in whole or in part, and believes there are compelling reasons that, if known to the FAA, would cause the FAA to suspend or delay the procurement because of the protested action, the protester shall:**

**(1) Set forth each such compelling reason, supply all facts supporting the protester's position, identify each person with knowledge of the facts supporting each compelling reason, and identify all documents that support each compelling reason.**

**(2) Clearly identify any adverse consequences to the protester, the FAA, or any interested party, should the FAA not suspend or delay the procurement.**

**(e) At the same time as filing the protest with the Office of Dispute Resolution for Acquisition, the protester shall serve a copy of the protest on the CO and any other official designated in the SIR for receipt of protests by means reasonably calculated to be received by the CO on the same day as it is to be received by the Office of Dispute Resolution for Acquisition. The protest shall include a signed statement from the protester, certifying to the Office of Dispute Resolution for Acquisition the manner of service, date, and time when a copy of the protest was served on the CO and other designated official(s).**

**(f) Upon receipt of the protest, the CO shall inform the Office of Dispute Resolution for Acquisition of the names, addresses, and telephone and facsimile numbers of the awardee and/or other interested parties, if known, and shall, in such notice, designate a person as the point of contact for the Office of Dispute Resolution for Acquisition. Such notice may be submitted to the Office of Dispute Resolution for Acquisition by facsimile. The CO shall also notify the awardee and/or interested parties in writing of the existence of the protest the same day as the CO provides the foregoing information to the Office of Dispute Resolution for Acquisition. The awardee and/or interested parties shall notify the ODRA in writing, of their interest in participating in the protest as intervenors within two (2) business days of receipt of the CO's notification, and shall, in such notice, designate a person as the point of contact for the ODRA. Such notice may be submitted to the ODRA by facsimile.**

**(g) The Office of Dispute Resolution for Acquisition has discretion to designate the parties who shall participate in the protest as intervenors. For awarded contracts, only the awardee may participate as an intervenor.**

#### **§ 17.17 Initial protest procedures.**

**(a) If, as part of a protest, the protester requests a suspension or delay of procurement, in whole or in part, pursuant to §17.15(d), the Product Team shall submit a response to the request to the Office of Dispute Resolution for Acquisition within two (2) business days of receipt of the protest. Copies of the response shall be furnished to the protester and any intervenor(s) so as to be received within the same two (2) business days. The protester and any intervenor(s) shall have the opportunity of providing additional comments on the response within an additional period of two (2) business days. Based on its review of such submissions, the Office of Dispute Resolution for Acquisition, in its discretion, may recommend such suspension or delay to the Administrator or the Administrator's designee.**

**(b) Within five (5) business days of the filing of a protest, or as soon thereafter as practicable, the Office of Dispute Resolution for Acquisition shall convene a status conference to --**

**(1) Review procedures;**

**(2) Identify and develop issues related to summary dismissal and suspension recommendations;**

**(3) Handle issues related to protected information and the issuance of any needed protective order;**

**(4) Encourage the parties to use ADR;**

**(5) Conduct or arrange for early neutral evaluation of the protest by a DRO or Neutral or Compensated Neutral, at the discretion of the Office of Dispute Resolution for Acquisition and/or based upon the agreement or request of any party(ies) seeking such evaluation; and**

**(6) For any other reason deemed appropriate by the DRO or by the Office of Dispute Resolution for Acquisition.**

**(c) On the fifth business day following the status conference, the Product Team and protester will file with the Office of Dispute Resolution for Acquisition --**

**(1) A joint statement that they have decided to pursue ADR proceedings in lieu of adjudication in order to resolve the protest; or**

**(2) Joint or separate written explanations as to why ADR proceedings will not be used and why the Default Adjudicative Process will be needed.**

**(d) Should the Product Team and protester elect to utilize ADR proceedings to resolve the protest, they will agree upon the neutral to conduct the ADR proceedings (either an Office of Dispute Resolution for Acquisition-designated Neutral or a Compensated Neutral of their own choosing) pursuant to §17.33(c), and shall execute and file with the Office of Dispute Resolution for Acquisition a written ADR agreement within five (5) business days after the status conference. Agreement of any intervenor(s) to the use of ADR or the resolution of a dispute through ADR shall not be required.**

**(e) Should the Product Team or protester indicate at the status conference that ADR proceedings will not be used, then within ten (10) business days following the status conference, the Product Team will file with the Office of Dispute Resolution for Acquisition a Product Team Response to the protest. The Office of Dispute Resolution for Acquisition may alter the schedule for filing of the Product Team Response to accommodate the requirements of a particular protest.**

**(f) The Product Team Response shall consist of a written chronological statement of pertinent facts, and a written presentation of applicable legal or other defenses. The Product Team Response shall cite to and be accompanied by all relevant documents, which shall be chronologically indexed and tabbed. A copy of the response shall be furnished so as to be received by the protester and any intervenor(s) on the same date it is filed with the Office of Dispute Resolution for Acquisition, if practicable, but in any event no later than one (1) business day after the date it is filed with the Office of Dispute Resolution for Acquisition. In all cases, the Product Team shall indicate the method of service used.**

**(g) Should the parties pursue ADR proceedings under Subpart D and fail to achieve a complete resolution of the protest via ADR, the Office of Dispute Resolution for Acquisition, upon notification of that fact by any of the parties, shall designate a DRO or Special Master for purposes of adjudication under Subpart E, and the DRO or Special Master shall convene a status conference, wherein he/she shall establish a schedule for the filing of the Product Team Response and further submissions.**

**(h) Upon submission of the Product Team Response, the protest will proceed under the Default Adjudicative Process pursuant to §17.37.**

**(i) The time limitations of this section may be extended by the Office of Dispute Resolution for Acquisition for good cause.**

**§ 17.19 Dismissal or summary decision of protests.**

**(a) At any time during the protest, any party may request, by motion to the Office of Dispute Resolution for Acquisition, that --**

**(1) The protest, or any count or portion of a protest, be dismissed for lack of jurisdiction, if the protester fails to establish that the protest is timely, or that the protester has no standing to pursue the protest;**

**(2) The protest, or any count or portion of a protest, be dismissed, if frivolous or without basis in fact or law, or for failure to state a claim upon which relief may be had;**

**(3) A summary decision be issued with respect to the protest, or any count or portion of a protest, if:**

**(i) The undisputed material facts demonstrate a rational basis for the Product Team action or inaction in question, and there are no other material facts in dispute that would overcome a finding of such a rational basis; or**

**(ii) The undisputed material facts demonstrate, that no rational basis exists for the Product Team action or inaction in question, and there are no material facts in dispute that would overcome a finding of the lack of such a rational basis.**

**(b) In connection with any request for dismissal or summary decision, the Office of Dispute Resolution for Acquisition shall consider any material facts in dispute, in a light most favorable to the party against whom the request is made.**

**(c) Either upon motion by a party or on its own initiative, the Office of Dispute Resolution for Acquisition may, at any time, exercise its discretion to:**

**(1) Recommend to the Administrator dismissal or the issuance of a summary decision with respect to the entire protest;**

**(2) Dismiss the entire protest or issue a summary decision with respect to the entire protest, if delegated that authority by the Administrator; or**

**(3) Dismiss or issue a summary decision with respect to any count or portion of a protest.**



**(d) A dismissal or summary decision regarding the entire protest by either the Administrator, or the Office of Dispute Resolution for Acquisition by delegation, shall be construed as a final agency order. A dismissal or summary decision that does not resolve all counts or portions of a protest shall not constitute a final agency order, unless and until such dismissal or decision is incorporated or otherwise adopted in a decision by the Administrator (or the Office of Dispute Resolution for Acquisition, by delegation) regarding the entire protest.**

**(e) Prior to recommending or entering either a dismissal or a summary decision, either in whole or in part, the Office of Dispute Resolution for Acquisition shall afford all parties against whom the dismissal or summary decision is to be entered the opportunity to respond to the proposed dismissal or summary decision.**

#### **§ 17.21 Protest remedies.**

**(a) The Office of Dispute Resolution for Acquisition has broad discretion to recommend remedies for a successful protest that are consistent with the AMS and applicable statutes. Such remedies may include, but are not limited to one or more, or a combination of, the following -**

- (1) Amend the SIR;**
- (2) Refrain from exercising options under the contract;**
- (3) Issue a new SIR;**
- (4) Require recompetition;**
- (5) Terminate an existing contract for the FAA's convenience;**
- (6) Direct an award to the protester;**
- (7) Award bid and proposal costs; or**
- (8) Any combination of the above remedies, or any other action consistent with the AMS that is appropriate under the circumstances.**

**(b) In determining the appropriate recommendation, the Office of Dispute Resolution for Acquisition should consider the circumstances surrounding the procurement or proposed procurement including, but not limited to: the nature of the procurement deficiency; the degree of prejudice to other parties or to the integrity of the acquisition system; the good faith of the parties; the extent of performance completed; the cost of any proposed remedy to the FAA; the urgency of the procurement; and the impact of the recommendation on the**

**FAA.**

**(c) Attorney's fees of a prevailing protester are allowable to the extent permitted by the Equal Access to Justice Act, 5 U.S.C. 504(a)(1)(EAJA).**

### **Subpart C - Contract Disputes**

**§ 17.23 Dispute resolution process for contract disputes.**

**(a) All contract disputes arising under contracts subject to the AMS shall be resolved under this subpart.**

**(b) Contractors shall file contract disputes with the Office of Dispute Resolution for Acquisition and the CO pursuant to §17.25.**

**(c) After filing the contract dispute, the contractor should seek informal resolution with the CO:**

**(1) The CO, with the advice of FAA legal counsel, has full discretion to settle contract disputes, except where the matter involves fraud;**

**(2) The parties shall have up to twenty (20) business days within which to resolve the dispute informally, and may contact the Office of Dispute Resolution for Acquisition for assistance in facilitating such a resolution; and**

**(3) If no informal resolution is achieved during the twenty (20) business day period, the parties shall file joint or separate statements with the Office of Dispute Resolution for Acquisition pursuant to §17.27.**

**(d) If informal resolution of the contract dispute appears probable, the Office of Dispute Resolution for Acquisition shall extend the time for the filing of the joint statement under §17.27 for up to an additional twenty (20) business days, upon joint request of the CO and contractor.**

**(e) The Office of Dispute Resolution for Acquisition shall hold a status conference with the parties within ten (10) business days after receipt of the joint statement required by §17.27, or as soon thereafter as is practicable, in order to establish the procedures to be utilized to resolve the contract dispute.**

**(f) The Office of Dispute Resolution for Acquisition has broad discretion to recommend**

remedies for a successful contract dispute, that are consistent with the AMS and applicable law.

**§ 17.25 Filing a contract dispute.**

**(a) Contract disputes are to be in writing and shall contain:**

- (1) The contractor's name, address, telephone and fax numbers and the name, address, telephone and fax numbers of the contractor's legal representative(s) (if any) for the contract dispute;**
- (2) The contract number and the name of the Contracting Officer;**
- (3) A detailed chronological statement of the facts and of the legal grounds for the contractor's positions regarding each element or count of the contract dispute (*i.e.*, broken down by individual claim item), citing to relevant contract provisions and documents and attaching copies of those provisions and documents;**
- (4) All information establishing that the contract dispute was timely filed;**
- (5) A request for a specific remedy, and if a monetary remedy is requested, a sum certain must be specified and pertinent cost information and documentation (*e.g.*, invoices and cancelled checks) attached, broken down by individual claim item and summarized; and**
- (6) The signature of a duly authorized representative of the initiating party.**

**(b) Contract disputes shall be filed by mail, in person, by overnight delivery or by facsimile at the following address:**

**(1) Office of Dispute Resolution for Acquisition, AGC-70,  
Federal Aviation Administration  
800 Independence Avenue, S.W., Room 323  
Washington, DC 20591  
Telephone: (202) 267-3290, Facsimile: (202) 267-3720  
[as changed per 67 FR 71607, December 2, 2002]; or**

**(2) Other address as shall be published from time to time in the Federal Register.**

**(c) A contract dispute against the FAA shall be filed with the Office of Dispute Resolution for Acquisition within two (2) years of the accrual of the contract claim involved. A contract dispute by the FAA against a contractor (excluding contract disputes alleging warranty**

issues, fraud or latent defects) likewise shall be filed within two (2) years after the accrual of the contract claim. If an underlying contract entered into prior to the effective date of this part provides for time limitations for filing of contract disputes with The Office of Dispute Resolution for Acquisition which differ from the aforesaid two (2) year period, the limitation periods in the contract shall control over the limitation period of this section. In no event will either party be permitted to file with the Office of Dispute Resolution for Acquisition a contract dispute seeking an equitable adjustment or other damages after the contractor has accepted final contract payment, with the exception of FAA claims related to warranty issues, gross mistakes amounting to fraud or latent defects. FAA claims against the contractor based on warranty issues must be filed within the time specified under applicable contract warranty provisions. Any FAA claims against the contractor based on gross mistakes amounting to fraud or latent defects shall be filed with the Office of Dispute Resolution for Acquisition within two (2) years of the date on which the FAA knew or should have known of the presence of the fraud or latent defect.

(d) A party shall serve a copy of the contract dispute upon the other party, by means reasonably calculated to be received on the same day as the filing is to be received by the Office of Dispute Resolution for Acquisition.

#### **§ 17.27 Submission of joint or separate statements.**

(a) If the matter has not been resolved informally, the parties shall file joint or separate statements with the Office of Dispute Resolution for Acquisition no later than twenty (20) business days after the filing of the contract dispute. The Office of Dispute Resolution for Acquisition may extend this time, pursuant to §17.23(d).

(b) The statement(s) shall include either --

(1) A joint request for ADR, and an executed ADR agreement, pursuant to §17.33 (d), specifying which ADR techniques will be employed; or

(2) Written explanation(s) as to why ADR proceedings will not be used and why the Default Adjudicative Process will be needed.

(c) Such statements shall be directed to the following address:

(1) Office of Dispute Resolution for Acquisition, AGC-70  
Federal Aviation Administration, 400 7<sup>th</sup> Street, S.W., Room 8332  
Washington, DC 20590

Telephone: (202)366-6400, Facsimile: (202)366-7400; or

**(2) Other address as shall be published from time to time in the Federal Register.**

**(d) The submission of a statement which indicates that ADR will not be utilized will not in any way preclude the parties from engaging in informal ADR techniques with the Office of Dispute Resolution for Acquisition (neutral evaluation and/or informal mediation) concurrently with ongoing adjudication under the Default Adjudicative Process, pursuant to §17.31(c).**

**§ 17.29 Dismissal or summary decision of contract disputes.**

**(a) Any party may request, by motion to the Office of Dispute Resolution for Acquisition, that a contract dispute be dismissed, or that a count or portion of a contract dispute be stricken, if:**

**(1) It was not timely filed with the Office of Dispute Resolution for Acquisition;**

**(2) It was filed by a subcontractor;**

**(3) It fails to state a matter upon which relief may be had; or**

**(4) It involves a matter not subject to the jurisdiction of the Office of Dispute Resolution for Acquisition.**

**(b) In connection with any request for dismissal of a contract dispute, or to strike a count or portion thereof, the Office of Dispute Resolution for Acquisition should consider any material facts in dispute in a light most favorable to the party against whom the request for dismissal is made.**

**(c) At any time, whether pursuant to a motion or request or on its own initiative and at its discretion, the Office of Dispute Resolution for Acquisition may --**

**(1) Dismiss or strike a count or portion of a contract dispute;**

**(2) Recommend to the Administrator that the entire contract dispute be dismissed; or**

**(3) With delegation from the Administrator, dismiss the entire contract dispute.**

**(d) An order of dismissal of the entire contract dispute, issued either by the Administrator or by the Office of Dispute Resolution for Acquisition where delegation exists, on the grounds set forth in this section, shall constitute a final agency order. An Office of Dispute Resolution for Acquisition order dismissing or striking a count or portion of a contract dispute shall not constitute a final agency order, unless and until such Office of Dispute Resolution for**

**Acquisition order is incorporated or otherwise adopted in a decision of the Administrator or the Administrator's delegee.**

**(e) Prior to recommending or entering either a dismissal or a summary decision, either in whole or in part, the Office of Dispute Resolution for Acquisition shall afford all parties against whom the dismissal or summary decision is to be entered the opportunity to respond to a proposed dismissal or summary decision.**

### **Subpart D - Alternative Dispute Resolution**

#### **§ 17.31 Use of alternative dispute resolution.**

**(a) The Office of Dispute Resolution for Acquisition shall encourage the parties to utilize ADR as their primary means to resolve protests and contract disputes.**

**(b) The parties shall make a good faith effort to explore ADR possibilities in all cases and to employ ADR in every appropriate case. The Office of Dispute Resolution for Acquisition will encourage use of ADR techniques such as mediation, neutral evaluation, or minitrials, or variations of these techniques as agreed by the parties and approved by the Office of Dispute Resolution for Acquisition. The Office of Dispute Resolution for Acquisition shall assign a DRO to explore ADR options with the parties and to arrange for an early neutral evaluation of the merits of a case, if requested by any party.**

**(c) The Default Adjudicative Process will be used where the parties cannot achieve agreement on the use of ADR; or where ADR has been employed but has not resolved all pending issues in dispute; or where the Office of Dispute Resolution for Acquisition concludes that ADR will not provide an expeditious means of resolving a particular dispute. Even where the Default Adjudicative Process is to be used, the Office of Dispute Resolution for Acquisition, with the parties' consent, may employ informal ADR techniques concurrently with and in parallel to adjudication.**

#### **§ 17.33 Election of alternative dispute resolution process.**

**(a) The Office of Dispute Resolution for Acquisition will make its personnel available to serve as Neutrals in ADR proceedings and, upon request by the parties, will attempt to make qualified non-FAA personnel available to serve as Neutrals through neutral-sharing programs and other similar arrangements. The parties may elect to employ a mutually acceptable Compensated Neutral, if the parties agree as to how the costs of any such Compensated Neutral are to be shared.**

**(b) The parties using an ADR process to resolve a protest shall submit an executed ADR agreement containing the information outlined in paragraph (d) of this section to the Office of Dispute Resolution for Acquisition within five (5) business days after the Office of Dispute Resolution for Acquisition conducts a status conference pursuant to §17.17(c). The Office of Dispute Resolution for Acquisition may extend this time for good cause.**

**(c) The parties using an ADR process to resolve a contract dispute shall submit an executed ADR agreement containing the information outlined in paragraph (d) of this section to the Office of Dispute Resolution for Acquisition as part of the joint statement specified under §17.27.**

**(d) The parties to a protest or contract dispute who elect to use ADR must submit to the Office of Dispute Resolution for Acquisition an ADR agreement setting forth:**

**(1) The type of ADR technique(s) to be used;**

**(2) The agreed-upon manner of using the ADR process; and**

**(3) Whether the parties agree to use a Neutral through The Office of Dispute Resolution for Acquisition or to use a Compensated Neutral of their choosing, and, if a Compensated Neutral is to be used, how the cost of the Compensated Neutral's services will be shared.**

**(e) Non-binding ADR techniques are not mutually exclusive, and may be used in combination if the parties agree that a combination is most appropriate to the dispute. The techniques to be employed must be determined in advance by the parties and shall be expressly described in their ADR agreement. The agreement may provide for the use of any fair and reasonable ADR technique that is designed to achieve a prompt resolution of the matter. An ADR agreement for non-binding ADR shall provide for a termination of ADR proceedings and the commencement of adjudication under the Default Adjudicative Process, upon the election of any party. Notwithstanding such termination, the parties may still engage with the Office of Dispute Resolution for Acquisition in informal ADR techniques (neutral evaluation and/or informal mediation) concurrently with adjudication, pursuant to §17.31(c).**

**(f) Binding arbitration may be permitted by the Office of Dispute Resolution for Acquisition on a case-by-case basis; and shall be subject to the provisions of 5 U.S.C. 575(a), (b), and (c), and any other applicable law. Arbitration that is binding on the parties, subject to the Administrator's right to approve or disapprove the arbitrator's decision, may also be permitted.**

**(g) For protests, the ADR process shall be completed within twenty (20) business days from the filing of an executed ADR agreement with the Office of Dispute Resolution for**

**Acquisition unless the parties request, and are granted an extension of time from the Office of Dispute Resolution for Acquisition.**

**(h) For contract disputes, the ADR process shall be completed within forty (40) business days from the filing of an executed ADR agreement with the Office of Dispute Resolution for Acquisition, unless the parties request, and are granted an extension of time from the Office of Dispute Resolution for Acquisition.**

**(i) The parties shall submit to the Office of Dispute Resolution for Acquisition an agreed-upon protective order, if necessary, in accordance with the requirements of §17.9.**

#### **§ 17.35 Selection of neutrals for the alternative dispute resolution process.**

**(a) In connection with the ADR process, the parties may select a Compensated Neutral acceptable to both, or may request the Office of Dispute Resolution for Acquisition to provide the services of a DRO or other Neutral.**

**(b) In cases where the parties select a Compensated Neutral who is not familiar with Office of Dispute Resolution for Acquisition procedural matters, the parties or Compensated Neutral may request the Office of Dispute Resolution for Acquisition for the services of a DRO to advise on such matters.**

### **Subpart E - Default Adjudicative Process**

#### **§ 17.37 Default adjudicative process for protests.**

**(a) Other than for the resolution of preliminary or dispositive matters, the Default Adjudicative Process for protests will commence upon the submission of the Product Team Response to the Office of Dispute Resolution for Acquisition, pursuant to §17.17.**

**(b) The Director of the Office of Dispute Resolution for Acquisition shall select a DRO or a Special Master to conduct fact-finding proceedings and to provide findings and recommendations concerning some or all of the matters in controversy.**

**(c) The DRO or Special Master may prepare procedural orders for the proceedings as deemed appropriate; and may require additional submissions from the parties. As a minimum, the protester and any intervenor(s) must submit to the Office of Dispute Resolution for Acquisition written comments with respect to the Product Team Response within five (5) business days of the Response having been filed with the Office of Dispute Resolution for Acquisition or within five (5) business days of their receipt of the Response,**



**whichever is later. Copies of such comments shall be provided to the other participating parties by the same means and on the same date as they are furnished to the Office of Dispute Resolution for Acquisition.**

**(d) The DRO or Special Master may convene the parties and/or their representatives, as needed, to pursue the Default Adjudicative Process.**

**(e) If, in the sole judgment of the DRO or Special Master, the parties have presented written material sufficient to allow the protest to be decided on the record presented, the DRO or Special Master shall have the discretion to decide the protest on that basis.**

**(f) The parties may engage in voluntary discovery with one another and, if justified, with non-parties, so as to obtain information relevant to the allegations of the protest. The DRO or Special Master may also direct the parties to exchange, in an expedited manner, relevant, non-privileged documents. Where justified, the DRO or Special Master may direct the taking of deposition testimony, however, the FAA dispute resolution process does not contemplate extensive discovery. The DRO or Special Master shall manage the discovery process, including limiting its length and availability, and shall establish schedules and deadlines for discovery, which are consistent with time frames established in this part and with the FAA policy of providing fair and expeditious dispute resolution.**

**(g) The DRO or Special Master may conduct hearings, and may limit the hearings to the testimony of specific witnesses and/or presentations regarding specific issues. The DRO or Special Master shall control the nature and conduct of all hearings, including the sequence and extent of any testimony. Hearings will be conducted: (1) where the DRO or Special Master determines that there are complex factual issues in dispute that cannot adequately or efficiently be developed solely by means of written presentations and/or that resolution of the controversy will be dependent on his/her assessment of the credibility of statements provided by individuals with first-hand knowledge of the facts; or (2) upon request of any party to the protest, unless the DRO or Special Master finds specifically that a hearing is unnecessary and that no party will be prejudiced by limiting the record in the adjudication to the parties' written submissions. All witnesses at any such hearing shall be subject to cross-examination by the opposing party and to questioning by the DRO or Special Master.**

**(h) The Director of the Office of Dispute Resolution for Acquisition may review the status of any protest in the Default Adjudicative Process with the DRO or Special Master during the pendency of the process.**

**(i) Within thirty (30) business days of the commencement of the Default Adjudicative Process, or at the discretion of the Office of Dispute Resolution for Acquisition, the DRO or Special Master will submit findings and recommendations to the Office of Dispute Resolution for Acquisition that shall contain the following:**

**(1) Findings of fact;**

**(2) Application of the principles of the AMS, and any applicable law or authority to the findings of fact;**

**(3) A recommendation for a final FAA order; and**

**(4) If appropriate, suggestions for future FAA action.**

**(j) In arriving at findings and recommendations relating to protests, the DRO or Special Master shall consider whether or not the Product Team actions in question had a rational basis, and whether or not the Product Team decision under question was arbitrary, capricious or an abuse of discretion. Findings of fact underlying the recommendations must be supported by substantial evidence.**

**(k) The DRO or Special Master has broad discretion to recommend a remedy that is consistent with §17.21.**

**(l) A DRO or Special Master shall submit findings and recommendations only to the Director of the Office of Dispute Resolution for Acquisition. The findings and recommendations will be released to the parties and to the public, only upon issuance of the final FAA order in the case. Should an Office of Dispute Resolution for Acquisition protective order be issued in connection with the protest, a redacted version of the findings and recommendations, omitting any protected information, shall be prepared wherever possible and released to the public along with a copy of the final FAA order. Only persons admitted by the Office of Dispute Resolution for Acquisition under the protective order and Government personnel shall be provided copies of the unredacted findings and recommendations.**

**(m) The time limitations set forth in this section may be extended by the Office of Dispute Resolution for Acquisition for good cause.**

#### **§ 17.39 Default adjudicative process for contract disputes.**

**(a) The Default Adjudicative Process for contract disputes will commence on the latter of:**

**(1) The parties' submission to the Office of Dispute Resolution for Acquisition of a joint statement pursuant to §17.27 which indicates that ADR will not be utilized;  
or**

**(2) The parties' submission to the Office of Dispute Resolution for Acquisition of notification by any party that the parties have not settled some or all of the**

**dispute issues via ADR, and it is unlikely that they can do so within the time period allotted and/or any reasonable extension.**

**(b) Within twenty (20) business days of the commencement of the Default Adjudicative Process, the Product Team shall prepare and submit to the Office of Dispute Resolution for Acquisition, with a copy to the contractor, a chronologically arranged and indexed Dispute File, containing all documents which are relevant to the facts and issues in dispute. The contractor will be entitled to supplement such a Dispute File with additional documents.**

**(c) The Director of the Office of Dispute Resolution for Acquisition shall assign a DRO or a Special Master to conduct fact-finding proceedings and provide findings and recommendations concerning the issues in dispute.**

**(d) The Director of the Office of Dispute Resolution for Acquisition may delegate authority to the DRO or Special Master to conduct a Status Conference within ten (10) business days of the commencement of the Default Adjudicative Process, and, may further delegate to the DRO or Special Master the authority to issue such orders or decisions to promote the efficient resolution of the contract dispute.**

**(e) At any such Status Conference, or as necessary during the Default Adjudicative Process, the DRO or Special Master will:**

- (1) Determine the appropriate amount of discovery required to resolve the dispute;**
- (2) Review the need for a protective order, and if one is needed, prepare a protective order pursuant to §17.9;**
- (3) Determine whether any issue can be stricken; and**
- (4) Prepare necessary procedural orders for the proceedings.**

**(f) At a time or at times determined by the DRO or Special Master, and in advance of the decision of the case, the parties shall make final submissions to the Office of Dispute Resolution for Acquisition and to the DRO or Special Master, which submissions shall include the following:**

- (1) A joint statement of the issues;**
- (2) A joint statement of undisputed facts related to each issue;**
- (3) Separate statements of disputed facts related to each issue, with appropriate citations to documents in the Dispute File, to pages of transcripts of any hearing**

or deposition, or to any affidavit or exhibit which a party may wish to submit with its statement;

**(4) Separate legal analyses in support of the parties' respective positions on disputed issues.**

**(g) Each party shall serve a copy of its final submission on the other party by means reasonable calculated so that the other party receives such submissions on the same day it is received by the Office of Dispute Resolution for Acquisition.**

**(h) The DRO or Special Master may decide the contract dispute on the basis of the record and the submissions referenced in this section, or may, in the DRO or Special Master's discretion, allow the parties to make additional presentations in writing. The DRO or Special Master may conduct hearings, and may limit the hearings to the testimony of specific witnesses and/or presentations regarding specific issues. The DRO or Special Master shall control the nature and conduct of all hearings, including the sequence and extent of any testimony. Evidentiary hearings on the record shall be conducted by the ODRA: (1) where the DRO or Special Master determines that there are complex factual issues in dispute that cannot adequately or efficiently be developed solely by means of written presentations and/or that resolution of the controversy will be dependent on his/her assessment of the credibility of statements provided by individuals with first-hand knowledge of the facts; or (2) upon request of any party to the contract dispute, unless the DRO or Special Master finds specifically that a hearing is unnecessary and that no party will be prejudiced by limiting the record in the adjudication to the parties' written submissions. All witnesses at any such hearing shall be subject to cross-examination by the opposing party and to questioning by the DRO or Special Master.**

**(i) The DRO or Special Master shall prepare findings and recommendations within thirty (30) business days from receipt of the final submissions of the parties, unless that time is extended by the Office of Dispute Resolution for Acquisition for good cause. The findings and recommendations shall contain findings of fact, application of the principles of the AMS and other law or authority applicable to the findings of fact, a recommendation for a final FAA order, and, if appropriate, suggestions for future FAA action.**

**(j) As a part of the findings and recommendations, the DRO or Special Master shall review the disputed issue or issues in the context of the contract, any applicable law and the AMS. Any finding of fact set forth in the findings and recommendations must be supported by substantial evidence.**

**(k) The Director of the Office of Dispute Resolution for Acquisition may review the status of any contract dispute in the Default Adjudicative Process with the DRO or Special Master during the pendency of the process.**

**(l) A DRO or Special Master shall submit findings and recommendations only to the Director of the Office of Dispute Resolution for Acquisition. The findings and recommendations will be released to the parties and to the public, upon issuance of the final FAA order in the case. Should an Office of Dispute Resolution for Acquisition protective order be issued in connection with the contract dispute, a redacted version of the findings and recommendations omitting any protected information, shall be prepared wherever possible and released to the public along with a copy of the final FAA order. Only persons admitted by the Office of Dispute Resolution for Acquisition under the protective order and Government personnel shall be provided copies of the unredacted findings and recommendations.**

**(m) The time limitations set forth in this section may be extended by the Office of Dispute Resolution for Acquisition for good cause.**

**(n) Attorneys' fees of a qualified prevailing contractor are allowable to the extent permitted by the EAJA, 5 U.S.C. 504(a)(1).**

## **Subpart F - Finality and Review**

### **§ 17.41 Final orders.**

**All final FAA orders regarding protests or contract disputes under this part are to be issued by the FAA Administrator or by a delegee of the Administrator.**

### **§ 17.43 Judicial review.**

**(a) A protester or contractor may seek review of a final FAA order, pursuant to 49 U.S.C. 46110, only after the administrative remedies of this part have been exhausted.**

**(b) A copy of the petition for review shall be filed with the Office of Dispute Resolution for Acquisition and the FAA Chief Counsel on the date that the petition for review is filed with the appropriate circuit court of appeals.**

### **§ 17.45 Conforming amendments.**

**The FAA shall amend pertinent provisions of the AMS, standard contract forms and clauses, and any guidance to contracting officials, so as to conform to the provisions of this part.**

---

## **APPENDIX A TO PART 17-ALTERNATIVE DISPUTE RESOLUTION (ADR)**

**A. The FAA dispute resolution procedures encourage the parties to protests and contract disputes to use ADR as the primary means to resolve protests and contract disputes, pursuant to the Administrative Dispute Resolution Act of 1996, Pub. L. 104-320, 5 U.S.C. 570-579, and Department of Transportation and FAA policies to utilize ADR to the maximum extent practicable. Under the procedures presented in this part, the Office of Dispute Resolution for Acquisition would encourage parties to consider ADR techniques such as case evaluation, mediation, or arbitration**

**B. ADR encompasses a number of processes and techniques for resolving protests or contract disputes. The most commonly used types include:**

**(1) Mediation.** The Neutral or Compensated Neutral ascertains the needs and interests of both parties and facilitates discussions between or among the parties and an amicable resolution of their differences, seeking approaches to bridge the gaps between the parties' respective positions. The Neutral or Compensated Neutral can meet with the parties separately, conduct joint meetings with the parties' representatives, or employ both methods in appropriate cases.

**(2) Neutral Evaluation.** At any stage during the ADR process, as the parties may agree, the Neutral or Compensated Neutral will provide a candid assessment and opinion of the strengths and weaknesses of the parties' positions as to the facts and law, so as to facilitate further discussion and resolution.

**(3) Minitrial.** The minitrial resembles adjudication, but is less formal. It is used to provide an efficient process for airing and resolving more complex, fact-intensive disputes. The parties select principal representatives who should be senior officials of their respective organizations, having authority to negotiate a complete settlement. It is preferable that the principals be individuals who were not directly involved in the events leading to the dispute and who, thus, may be able to maintain a degree of impartiality during the proceeding. In order to maintain such impartiality, the principals typically serve as "judges" over the mini-trial proceeding together with the Neutral or Compensated Neutral. The proceeding is aimed at informing the principal representatives and the Neutral or Compensated Neutral of the underlying bases of the parties' positions. Each party is given the opportunity and responsibility to present its position. The presentations may be made through the parties' counsel and/or through some limited testimony of fact witnesses or experts, which may be subject to cross-examination or rebuttal. Normally, witnesses are not sworn in and transcripts are not made of the proceedings. Similarly, rules of evidence are not directly applicable, though it is recommended that the Neutral or Compensated Neutral be provided

authority by the parties' ADR agreement to exclude evidence which is not relevant to the issues in dispute, for the sake of an efficient proceeding. Frequently, minitrials are followed either by direct one-on-one negotiations by the parties' principals or by meetings between the Neutral/Compensated Neutral and the parties' principals, at which the Neutral/Compensated Neutral may offer his or her views on the parties' positions (*i.e.*, Neutral Evaluation) and/or facilitate negotiations and ultimate resolution via Mediation.

Issued in Washington, D.C., on June 18, 1999

Jane F. Garvey  
Administrator

---

---

## TRANSPORTATION SECURITY ADMINISTRATION

The FAA Office of Dispute Resolution for Acquisition (ODRA), under [Delegation dated December 23, 2003](#), has been called upon to provide dispute resolution services to the U.S. Department of Homeland Security, [Transportation Security Administration \(TSA\)](#) in connection with designated TSA-related bid protests and contract disputes. (The December 23, 2003 delegation superseded an earlier [Delegation dated September 16, 2002](#).) Pursuant to language of the [Aviation and Transportation Security Act, Public Law 107-71](#), the FAA [Acquisition Management System \(AMS\)](#), applies to TSA acquisitions of equipment, supplies and materials. Under that statute, the AMS may be modified for use by TSA, as considered appropriate.

- [RETURN TO THE TOP OF THIS PAGE](#)
  - [RETURN TO THE GUIDE INTRODUCTION](#)
  - [ACCESSIBILITY ASSISTANCE](#)
- 
-

# Alternative Dispute Resolution (ADR)

*NOTE: The information set forth in this section is not intended as legal advice, but merely as a description of the ODRA's use of ADR.*

## Contents:

- [Introduction](#)
  - [Selection of a Neutral](#)
  - [Available ADR Methods](#)
  - [The Timing of ADR](#)
  - [Pre-Dispute/Dispute Avoidance ADR](#)
  - [The ADR Agreement](#)
  - [Settlement Terms](#)
  - [ODRA ADR Success Stories](#)
  - [ADR WEB LINKS](#)
  - [Feedback](#)
  - [ADR Survey Results](#)
- 

## Introduction

Consistent with Department of Transportation and FAA policies, the Office of Dispute Resolution for Acquisition (ODRA) is committed to using consensual ADR to the maximum amount practicable. On June 17, 1999, the FAA Associate Administrator for Research and Acquisitions and FAA Acquisition Executive executed an [Alternative Dispute Resolution Pledge](#), indicating a continuing commitment by the FAA to utilize ADR for the resolution of procurement related controversies. The procedures used by the ODRA emphasize to the parties (the protester/contractor and the cognizant FAA Product Team) the resolution of disputes through ADR. The Administrative Dispute Resolution Act of 1996, Pub. L. 104-320, authorizes and encourages appropriate use of ADR. ADR is an excellent way to resolve disputes more quickly and less expensively. Under ODRA procedures, the Default Adjudicative Process is used when the parties decide not to use ADR or cannot achieve agreement on the use of ADR, when the ODRA concludes that ADR will not provide an efficient or rapid means to resolve the dispute in a particular case, or when a complete resolution cannot be achieved via ADR.



ADR has been effectively used to settle the majority of ODRA cases involving Acquisition Management System (AMS) procurement protests and contract disputes. The ODRA also has used non-binding ADR techniques to resolve acquisition disputes that would not normally come before the Office, such as those under pre-AMS contracts (ones entered into prior to April 1, 1996), as well as for purposes of dispute avoidance, when a formal contract dispute has yet to be submitted to the ODRA.

ADR and the ODRA's Default Adjudicative Process are by no means mutually exclusive. For example, the ODRA frequently uses informal ADR techniques for bid protests concurrently with their adjudication under the Default Adjudicative Process. Also, for both bid protests and contract disputes, an ADR Neutral may assist the parties in establishing an appropriate discovery schedule for adjudication and in narrowing the issues to be resolved under the Default Adjudicative Process.

---

### **Selection of a Neutral**

The ODRA provides qualified Neutrals to assist in the ADR process. The parties can request the Director of the ODRA to assign as a Neutral a Dispute Resolution Officer (DRO), a licensed attorney who reports to the Director of the ODRA and who is trained in ADR, to implement the ADR method chosen by the parties. At the request of the parties, the Director of the ODRA may instead attempt to obtain to act as a Neutral, a qualified non-FAA employee who may be made available to the ODRA via an inter-agency or neutral sharing agreement. The FAA has such an agreement with the General Services Administration Board of Contract Appeals.

The parties also can agree to employ a person from outside the FAA or ODRA as a Compensated Neutral. See [14 C.F.R. §17.35](#). The parties must agree in their selection of a Compensated Neutral, and must also agree as to how the costs of the Compensated Neutral will be shared. The Director of the ODRA must approve the parties' choice of a Compensated Neutral, and the Director may assign a DRO to assist the Compensated Neutral with ODRA procedural matters.

If, as part of any ADR, an ODRA DRO has provided the parties with his/her evaluation of the merits of a case, that DRO will not be permitted to participate in the decision of the matter, should it proceed to adjudication via the ODRA's Default Adjudicative Process. Instead, a second DRO will be assigned by the ODRA

Director for purposes of adjudication, and the two DROs will not confer with each other regarding the merits of a case. This is done to ensure that the parties can confer candidly with the ADR Neutral without being concerned that the Neutral will be deciding their case. As noted above, the ODRA frequently will conduct informal ADR concurrently with adjudication. This is done particularly in highly complex or time-sensitive cases, so as to speed the resolution process. For such matters, there will be two DROs appointed at the inception of the case-- one for ADR and one for adjudication.

---

## Available ADR Methods

### Non-Adjudicative Forms of ADR

Non-adjudicative ADR encompasses a number of processes and techniques for resolving protests or contract disputes. See [14 C.F.R. §17.33\(e\)](#) and [14 C.F.R. Part 17, Appendix A](#). The two most commonly used techniques are:

(1) **Mediation**. The DRO, Neutral or Compensated Neutral ascertains the needs and interests of both parties and facilitates discussions between or among the parties and an amicable resolution of their differences, seeking approaches to bridge the gaps between the parties' respective positions. The DRO, Neutral or Compensated Neutral can meet with the parties separately, conduct joint meetings (or telephone conferences) with the parties' representatives, or use both methods. Mediation can either be done informally or pursuant to a formal mediation agreement, which details the process that will be employed.

(2) **Neutral Evaluation**. At any stage throughout the ADR process, as the parties may agree, the DRO, Neutral or Compensated Neutral can provide a candid assessment and opinion of the strengths and weaknesses of the parties' positions as to the facts and law, in order to facilitate further discussion and resolution. ODRA experience has shown that a percentage of protests filed with the ODRA can be resolved successfully by this ADR method at a very early "informal communications" stage. Considerable cost and time savings to the parties can result from successful use of this ADR technique. Upon the request of any party, or on his/her own initiative, an ODRA Neutral can provide a formal written evaluation which identifies reasonable settlement options that are consistent with the AMS and applicable law. Such an ODRA evaluation can be used by the parties in their decision making process and as part of their justification for any settlement ultimately achieved.

---

## Adjudicative Forms of ADR

(1) **Minitrial.** The minitrial proceeding is a hearing which resembles adjudication, but is somewhat less formal. It is used to provide a speedy process for airing and resolving fact-intensive disputes. The hearing is presided over by principal representatives of the parties who, along with the DRO, Neutral or Compensated Neutral, sit together as a panel of "judges," typically at a head table. The parties' principal representatives should be senior officials of their respective organizations who have authority to negotiate a complete settlement. It is preferable that the principals be individuals who were not directly involved in the events leading to the dispute and who, thus, may be able to approach the matters in controversy with some sense of objectivity and impartiality. The proceeding is aimed at informing the principal representatives and the DRO, Neutral or Compensated Neutral of the underlying bases of the parties' positions. Each party is given the opportunity and responsibility to present its position. The presentations may be made through the parties' counsel and/or through some limited testimony of fact witnesses or experts, which may be subject to cross-examination or rebuttal. Normally, witnesses are not sworn in and transcripts are not made of the proceedings. Similarly, rules of evidence are not directly applicable, though it is recommended that the DRO, Neutral or Compensated Neutral be provided authority by the parties' ADR Agreement to exclude evidence which is not relevant to the issues in dispute, for efficiency in the proceeding. Frequently, minitrials are followed either by direct one-on-one negotiations by the parties' principals or by meetings between the DRO, Neutral/Compensated Neutral and the parties' principals, at which the DRO, Neutral or Compensated Neutral may offer his or her views on the parties' positions (*i.e.*, Neutral Evaluation) and/or facilitate negotiations and ultimate resolution via Mediation.

(2) **Non-Binding Arbitration.** Arbitration is the best known form of adjudicative ADR. "Non-binding arbitration" is essentially a mini-trial proceeding presided over solely by the DRO or Neutral/Compensated Neutral acting as an "arbitrator." Following the proceeding, the arbitrator will provide the parties with an evaluative non-binding decision. Such a decision would serve as an indication of what the likely result might be, should the matter be fully litigated. It also may serve as the basis for further negotiations and/or Mediation. As an alternative, the parties may decide that the arbitrator should withhold issuing the non-binding decision, and may ask him/her instead to proceed directly with Mediation and to facilitate settlement discussions, based upon facts uncovered during the arbitration proceeding.

(2) **Binding Arbitration.** Binding arbitration is no different than "non-binding arbitration," except that the arbitrator (the DRO or other Neutral or Compensated Neutral) renders a formal binding arbitral award at the conclusion of the proceeding which may cover entitlement, quantum, or both. The decision will be issued in written form. Binding arbitration may be used, with the parties' agreement, but only under limited conditions. The Administrative Dispute Resolution Act of 1996 specifies its use being subject to agency guidelines, which are to be promulgated

with the assistance of the United States Department of Justice. See 5 U.S.C. §§575 (a), (b), and (c). The FAA developed draft guidance for the use of binding arbitration as part of the ODRA dispute resolution process. Such guidance was developed in accordance with a handbook entitled "Developing Guidance for Binding Arbitration," endorsed by the Federal ADR Council for use by federal agencies. The draft guidance was submitted to the Justice Department for review, and on July 26, 2001, the Attorney General formally concurred with the FAA's "draft guidance submitted to him for consultation pursuant to section 575 of the Administrative Dispute Resolution Act of 1996." The draft guidance was posted previously on this ODRA Website, and a notice of the draft guidance was published in the Federal Register, soliciting public review and comment. Upon expiration of the comment period, the draft guidance was finalized. The final guidance document (October 2001) is accessible from this ODRA Website. See [Final Arbitration Guidance](#).

Pending finalization of the guidance, the Justice Department had indicated the acceptability of a type of binding arbitration which the ODRA has employed successfully in the past, namely, arbitration which results in an arbitral award that is binding on the parties, subject to a decision by the FAA Administrator (or her delegee) to "opt out" of the award. This form of arbitration is still available under the ODRA process. See [14 C.F.R. §17.33\(f\)](#). Under this form of arbitration, the "opt out" decision is to be made by the Administrator (or her delegee), if at all, within a relatively short time frame specified by the parties' ADR Agreement (see below). In such cases, the Administrator's decision becomes a final Agency order, which is appealable in court, pursuant to 49 U.S.C. §46110. Under this form of arbitration, absent an Administrator's decision to "opt out," the arbitral award is binding and unappealable -- except in rare cases (fraud, etc.)

---

### **The Timing of ADR**

The ODRA procedures require that formal mediation or any adjudicative form of ADR (minitrial/arbitration) be completed within 20 working days for protests ([14 C.F.R. §17.33\(g\)](#)) and within 40 working days for contract disputes ([14 C.F.R. §17.33\(h\)](#)). These time frames begin with the date an executed ADR Agreement is filed with the ODRA and may be extended by the ODRA for good cause at the parties' request. Non-adjudicative forms of ADR (neutral evaluation/informal mediation) may continue through adjudication under the ODRA's Default Adjudicative Process, up until the Administrator's issuance of a final decision in the form of an FAA Order.

---

## Pre-Dispute/Dispute Avoidance ADR

Even before a formal bid protest or contract dispute is filed, the ODRA may assist parties through ADR to avoid a formal dispute by resolving a potential issue in controversy. Towards this end, the Administrator, as part of her [Delegation dated July 28, 1998](#), expressly authorized "ODRA Dispute Resolution Officers to engage with Agency program offices and contractors in voluntary mutually agreeable ADR efforts aimed at resolving acquisition related disputes at the earliest possible stage, even before any formal protest or contract dispute is formally filed with the ODRA." The ODRA also may assist parties by means of ADR in resolving issues in controversy relating to non-AMS or pre-AMS contracts, *i.e.*, contracts executed prior to April 1, 1996 effective date of the FAA Acquisition Management System. The ODRA treats such matters in the same manner as those involving pre-dispute/dispute avoidance ADR.

A representative of a private party or of the Agency may request pre-dispute/dispute avoidance ADR services from the ODRA. This request may be made by letter, e-mail or telephone. When the ODRA receives such a request, it will ask for some basic information about the dispute and the identities of other interested parties. The ODRA then contacts such other parties to determine their willingness to participate in a non-binding ADR process. Participation is purely voluntary; and the ODRA only will provide pre-dispute/dispute avoidance ADR services if the other interested parties agree. The parties are then asked to execute a simple ADR agreement, and the process begins. Typically, pre-dispute/dispute avoidance ADR is handled by the ODRA DRO who assists the parties initially. However, as with all ADR at the ODRA, the choice of ADR neutral is completely up to the parties. Thus, the parties may choose a different DRO or an outside neutral. The goal of the process is to help preserve the parties' business relationships and avoid a formal dispute, if possible. The ODRA has had significant success employing ADR techniques to resolve these matters.

---

## The ADR Agreement

conduct a formalized mediation proceeding or any adjudicative form of ADR, ODRA procedures require the parties to prepare, execute and file with the ODRA an ADR agreement which spells out:

- the type of ADR techniques to be used

- the specific manner in which those techniques will be used
- the DRO, Neutral, or Compensated Neutral to be used
- sharing the cost of any Compensated Neutral
- the terms of a mutually-agreeable protective order, should one be needed to protect confidential materials that may be used during the ADR proceeding

See [14 C.F.R. §17.33\(d\)](#). Model ADR Agreements are presented for two different forms of ADR, formal mediation and binding arbitration. Each type of ADR Agreement may be altered by the parties to suit the particular protest or contract dispute. The parties must submit the agreement to the ODRA for approval before the parties commence the ADR process.

PLEASE DOWNLOAD A MODEL AGREEMENT TO YOUR HARD DRIVE BEFORE ATTEMPTING TO MODIFY IT

[REVIEW THE MODEL MEDIATION AGREEMENT](#)

[REVIEW THE MODEL ARBITRATION AGREEMENT](#)

---

## Settlement Terms

The parties are well advised to spell out the terms of their settlement in a written settlement agreement. We have included for your use a model ADR settlement agreement. Its language should be modified to suit the particular needs of your case.

PLEASE DOWNLOAD THE MODEL AGREEMENT TO YOUR HARD DRIVE BEFORE ATTEMPTING TO MODIFY IT

[REVIEW THE MODEL ADR SETTLEMENT AGREEMENT](#)

---

## ODRA ADR Success Stories

The ODRA has achieved remarkable success through the use of ADR. Over 60% of all cases filed with the Office -- more than half of the bid protests and over 80% of all contract disputes -- are resolved by means of ADR. See [Case Management Statistics](#).

For some representative case studies showing how ADR can be used to achieve success,



[Click here.](#)

---

## ADR WEB LINKS

[Click here to access some helpful ADR web links.](#)

---

## Feedback

obtain feedback from participants in cases which have been resolved through ADR, the ODRA has instituted a practice of distributing ADR survey forms. If you have participated in a case that has been resolved through ADR at the ODRA and wish to submit a survey form but have not received one, you may download the form and submit it to the ODRA via facsimile at **(202) 267-3290** or via e-mail to [Gloria.Rosier@faa.gov](mailto:Gloria.Rosier@faa.gov).

[Click here to access a survey form](#)

[Click here to view the most recent survey results](#)

- [RETURN TO THE TOP OF THIS PAGE](#)
  - [RETURN TO THE GUIDE INTRODUCTION](#)
  - [ACCESSIBILITY ASSISTANCE](#)
- 

## ALTERNATIVE DISPUTE RESOLUTION PLEDGE

Pursuant to Federal Aviation Administration policy announced in the Acquisition Management System, originally issued on April 1, 1996, this agency is committed to the early and expeditious resolution of controversy. The effectiveness of mediation, fact-finding and other techniques collectively known as "alternative dispute resolution" (ADR) in contributing to early and effective resolution of contract related disputes and issues in controversy in appropriate cases is widely recognized in government, business and legal communities. To further the use of ADR in our agency, the Federal Aviation Administration pledges to:

1. Examine agency contracting practices, methods and documents to determine where alternative dispute resolution methods may be used and to determine the best methods and practices to employ.

- 2. Consider each dispute and each issue in controversy that arises for the appropriate application of consensual methods of dispute resolution to all or part of the matters of disagreement.**
- 3. Assure that integrated product teams and management teams receive training on the use of appropriate means of dispute resolution consistent with agency policy and governing statutes and regulations.**
- 4. Participate with other government agencies and interested parties in the development and sharing of information concerning the best policies and practice to use in the employment of alternative dispute resolution techniques.**
- 5. Discourage the use of more formal and more adversarial dispute resolution processes when less formal and consensual methods will produce a fair disposition of a controversy.**

**Dated this** 17 **day of** June **1999**

**(original signed by)**  
**Steven Zaidman**  
**Acquisition Executive**  
**Federal Aviation Administration**

# Default Adjudicative Process

**NOTE:** The information set forth in this section is not legal advice, but merely a summary of the adjudicative procedures employed by the ODRA.

## Contents:

# Introduction

## PROTESTS

## Who May File

## Content of Protests

## ***Filing Deadlines***

## Who May Participate in Protests

## ***Initial Protest Procedures***

## Confidential Materials -- Protective Orders

## Discovery



## [Hearings/Post-Hearing Submissions](#)

## [CONTRACT DISPUTES](#)

[Who May File](#)

[Content of Contract Disputes](#)

[Filing Limitations](#)

[Informal Communications](#)

[Joint or Separate Statements](#)

[Appointment of Fact-Finder/Status Conference](#)

[The Dispute File and Supplement;](#)

[Other Written Submissions](#)

[Discovery](#)

[Hearings](#)

[Final Written Submissions](#)

## [FINDINGS AND RECOMMENDATIONS](#)

## [FILING INSTRUCTIONS](#)

## [DISMISSAL FOR FAILURE TO PROSECUTE](#)

## [TIMING OF THE DEFAULT ADJUDICATIVE PROCESS](#)

---

### **Introduction**

The Default Adjudicative Process is the ODRA dispute resolution technique that is used if the parties cannot achieve a resolution of their differences via ADR. This process is presided over by a fact-finder designated by the ODRA and is designed to be faster and less formal than traditional litigation. Normal litigation procedures, such as motion practice and discovery are significantly more streamlined and thus less expensive and less time consuming for the parties. The fact-finder may be either a Dispute Resolution Officer (DRO) (a Senior Attorney on the ODRA staff) or a non-FAA employee appointed as a Special Master by the ODRA Director. See [14 C.F.R. §17.37\(b\)](#) and [14 C.F.R. §17.39\(c\)](#). The ODRA has an interagency agreement with the General Services Administration Board of Contract Appeals (GSBCA) to provide GSBCA Board Judges as ODRA Special Masters.

---

### **PROTESTS**

## ***Who May File***

Protests may only be filed with the ODRA (see [Filing Instructions](#) below) by persons or entities that qualify as "interested parties." [14 C.F.R. §17.15\(a\)](#). An "interested party" is --

"a prospective offeror whose direct economic interest would be affected by the award or failure to award an FAA contract, or an actual offeror with a reasonable chance to receive award of an FAA contract."

See [14 C.F.R. §17.3\(k\)](#) and [Protest of Metro Monitoring, Inc., 98-ODRA-00047](#).

## ***Content of Protests***

A protest must be submitted to the ODRA in writing, and must set forth:

- (1) The protester's name, address, telephone number, and facsimile (FAX) number;
- (2) The name, address, telephone number, and FAX number of a person designated by the protester (Protester Designee), and who shall be duly authorized to represent the protester, to be the point of contact;
- (3) The SIR number or, if available, the contract number and the name of the CO;
- (4) The basis for the protester's status as an interested party;
- (5) The facts supporting the timeliness of the protest (see [Filing Deadlines](#) below);
- (6) Whether the protester requests a protective order, the material to be protected, and attach a redacted copy of that material, which eliminates confidential or sensitive information;
- (7) A detailed statement of the factual grounds of the protest as well as the legal grounds, citing to applicable SIR provisions and supportive case precedent, and attaching one (1) copy of each relevant document;
- (8) The remedy or remedies sought by the protester;
- (9) The signature of the Protester Designee, or another person duly authorized to represent the protester.

See [14 C.F.R. §17.15\(c\)](#). If the protester wishes to request a suspension or delay of the procurement and believes there are compelling reasons that, if known to the FAA, would cause the FAA to suspend or delay the procurement because of the protested action, the protester shall within the protest letter:

(1) Set forth each such compelling reason, supply all facts supporting the protester's position, identify each person with knowledge of the facts supporting each compelling reason, and identify all documents that support each compelling reason.

(2) Clearly identify any adverse consequences to the protester, the FAA, or any interested party, should the FAA not suspend or delay the procurement.

[14 C.F.R. §17.15\(d\)](#). See also, generally, [Protest of Crown Communications, Inc., 98-ODRA-00098 \(Interlocutory Decision on Suspension Request\)](#); [Protest of J.A. Jones Management Services, Inc., 99-ODRA-00140 \(Interlocutory Decision on Suspension Request\)](#). At the same time as filing the protest with the ODRA, the protester is required to serve a copy of the protest on the Product Team's Contracting Officer (CO) and any other official designated in the Screening Information Request (SIR) for receipt of protests. That copy must be served by means reasonably calculated to be received by the CO on the same day as it is to be received by the ODRA. The protest letter must include a signed statement from the protester, certifying to the ODRA the manner of service, date, and time when a copy of the protest was served on the CO and other designated official(s). [14 C.F.R. §17.15\(e\)](#).

## **Filing Deadlines**

The procedural rules require that protests against improprieties in a solicitation (or solicitation amendment) be filed before the specified closing date for receipt of proposals. [14 C.F.R. §17.15\(a\) \(1\) and \(2\)](#). For protests other than those related to alleged solicitation improprieties, the protest must be filed on the later of the following two dates:

(i) Not later than seven (7) business days after the date the protester knew or should have known of the grounds for the protest; or

(ii) If the protester has requested a post-award debriefing from the FAA Product Team, not later than five (5) business days after the date on which the Product Team holds that debriefing.

[14 C.F.R. §17.15\(a\)\(3\)](#).

## **Who May Participate in Protests**

Aside from the protester and the FAA Product Team, the ODRA's procedures allow for other "interested parties" to intervene in a protest. For protests filed prior to the date established for

receipt of proposals, e.g., protests regarding the specifications or other terms of the solicitation, the ODRA has discretion to permit intervention by one or more other offerors who demonstrate that they qualify as "interested parties." For post-award protests, however, only the awardee will be permitted to participate as an intervenor. See [14 C.F.R. §17.15\(g\); Protests of Camber Corporation and Information Systems & Networks Corporation, 98-ODRA-00079 and 98-ODRA-00080 \(Consolidated\) \(Interlocutory Decision on Request for Participation by Systems Research Corporation\)](#). ODRA procedures require the Product Team CO immediately to provide notification to potential "interested parties" of the Team's receipt of a protest and permits requests for intervention within two (2) business days of receipt of the CO's notification. [14 C.F.R. §17.15\(f\)](#).

## **Initial Protest Procedures**

An ODRA Status Conference (ordinarily via telephone) is conducted with the parties within five (5) business days of the ODRA's receipt/docketing of a protest. [14 C.F.R. §17.17\(b\)](#).

Other than the protest letter itself, the only other submissions that will be required in every ODRA protest resolved via the Default Adjudicative Process will be an FAA Product Team Response and responsive protester Comments. The Product Team Response, similar to an agency report under General Accounting Office (GAO) bid protest procedures, must provide the ODRA with adequate background information regarding the procurement and must address the factual allegations and legal arguments raised by the protest. The Product Team Response will include:

- The Contracting Officer's chronological statement of the relevant facts, with citations to relevant documents;
- A memorandum of law;
- A chronologically arranged index and tabbed copies of all relevant documents, which may include:
  - the solicitation, including the specifications or portions relevant to the protest, an abstract of bids or offers or relevant portions; and
  - the bid or proposal submitted by the protester;
  - the bid or proposal submitted by the firm being considered for the award, or whose bid or proposal is being protested;
  - evaluation plans, memoranda, scoring sheets and other evaluation - related documents;
  - correspondence between the FAA Product Team and prospective offerors relating to the procurement;
  - the protest; and

- any other relevant documents.

**14 C.F.R. §17.17(f)**. The Product Team Response is due within ten (10) business days of the ODRA Status Conference, unless the parties opt to proceed with Alternative Dispute Resolution (ADR) -- either formal mediation or adjudicative ADR (mini-trial or arbitration) -- in lieu of adjudication under the Default Adjudicative Process. **14 C.F.R. §17.17(e)**. If such ADR is unsuccessful, the parties must notify the ODRA jointly or separately of that fact. In those circumstances, the ODRA will designate a DRO or Special Master for adjudication, and the DRO or Special Master will establish the time for submission of a Product Team Response. **14 C.F.R. §17.17(g)**.

The protester (and any intervenor) will be required to submit Comments with respect to the Product Team Response within five (5) business days of its filing with the ODRA or within five (5) business days of receiving the Product Team Response, whichever is later. Copies of the comments must be provided at the same time to the other parties. **14 C.F.R. §17.37(c)**. The Comments should include any additional information and documentation not included in the Product Team Response that are believed to be relevant to the issues raised by the protest. If yet additional information or documentation is deemed necessary by the ODRA fact-finder in order to complete the administrative record, the parties will be asked to provide such information and documentation. The intent of the ODRA is to keep written submissions to a minimum. Filing times (other than the deadlines established for filing the protest) may be extended by the ODRA for good cause. **14 C.F.R. §17.37(m)**.

### **Confidential Materials -- Protective Orders**

If resolution of a protest will require the submission to the ODRA of confidential, proprietary information of a protester or other "interested party" participant or the Product Team's sensitive source selection data, the ODRA has procedures for issuing Protective Orders to protect such information from disclosure. See **14 C.F.R. §17.9**. Under ODRA Protective Orders, individuals who participate in "competitive decision making" -- those involved in any way in preparing contract bids and proposals -- are precluded from having access to protected materials. Access to protected documents is normally limited to independent outside counsel and any of their consultants who are themselves not in "competitive decision making." In relatively rare circumstances, an in-house attorney may be permitted access to such materials. The ODRA reserves the right to deny admission under a protective order to any person who the ODRA determines may pose a risk in terms of disclosure of protected materials. See **Protests of Camber Corporation and Information Systems & Networks Corporation, 98-ODRA-00079 and 98-ODRA-00080 (Consolidated) (Interlocutory Decision on Application for Admission to Protective Order)**. Where there is a Protective Order in place and a party is not represented by counsel, it may be necessary for another party to submit sensitive information to the ODRA for in camera inspection. That procedure would allow the ODRA to consider critical information in connection with its resolution of the protest, without the need for disclosure of such information to other parties. More detailed information on the ODRA's Protective Orders (as well as a Model Order and Agreement and sample Applications

for Admission under the Order) can be found in a separate section of this Website. See [Protective Orders](#).

## **Discovery**

*In addition to the submission of documents as part of the Product Team Response and responsive Comments, the parties will be permitted to engage in focused discovery in the form of further document exchanges and possible depositions, limited in number and duration. Discovery may be done on a voluntary basis or pursuant to direction by the ODRA, where the DRO/Special Master finds, in his/her sole discretion, that it will be helpful to the development of the factual record in the case and will not unduly delay its resolution. [14 C.F.R. §17.37\(f\)](#). Copies of discovery materials exchanged between the parties are not to be submitted to the ODRA at the time they are produced. Such materials should only be submitted and will only be considered as part of the administrative record, if they are specifically incorporated into a party's evidentiary submission.*

## **Hearings/Post-Hearing Submissions**

*Although the great majority of protests will be decided on the basis of the written record alone, the DRO/Special Master will have broad discretion to schedule, structure and conduct a hearing, and will do so, if he/she determines one is necessary for the development of a complete record. A hearing will ordinarily be required (1) where, in his/her view, there are complex factual issues in dispute that cannot adequately or efficiently be developed solely by means of written presentations, and/or (2) where the DRO/Special Master determines that resolution of the protest will be dependent on his/her assessment of the credibility of statements provided by individuals with first-hand knowledge of the facts. Whenever a hearing is requested by a party, one will be conducted, unless the DRO or Special Master finds specifically that a hearing is unnecessary and that no party will be prejudiced by limiting the record in the adjudication to the parties' written submissions.*

*Where hearings are conducted, the fact-finder will have the discretion as to (1) the nature and type of hearing that is conducted; (2) whether or not there will be post-hearing written submissions which summarize the parties' respective positions in light of facts developed during the hearings; and (3) the content and any page limitations on any such submissions. See [14 C.F.R. §17.37\(g\)](#).*

---

## **CONTRACT DISPUTES**

### **Who May File**

*Contract disputes -- unresolved claims for contractual relief under or related to an existing FAA contract -- may be filed with the ODRA (see [Filing Instructions](#) below) either by contractors or by FAA Product Teams. There is no prerequisite that such matters be the*



**subject of a Contracting Officer's Final Decision before they can be submitted to the ODRA for resolution. However, the parties are encouraged to attempt to resolve their differences informally, if possible before filing with the ODRA.**

## **Content of Contract Disputes**

**The ODRA requires contract disputes to be in writing and to contain the following information:**

**(1) The contractor's name, address, telephone and fax numbers and the name, address, telephone and fax numbers of the contractor's legal representative(s) (if any) for the contract dispute;**

**(2) The contract number and the name of the Contracting Officer;**

**(3) A detailed chronological statement of the facts and of the legal grounds for the contractor's positions regarding each element or count of the contract dispute (i.e., broken down by individual claim item), citing to relevant contract provisions and documents and attaching copies of those provisions and documents;**

**(4) All information establishing that the contract dispute was timely filed (see [Filing Limitations](#), below);**

**(5) A request for a specific remedy, and if a monetary remedy is requested, a sum certain must be specified and pertinent cost information and documentation (e.g., invoices and cancelled checks) attached, broken down by individual claim item and summarized; and**

**(6) The signature of a duly authorized representative of the initiating party.**

**[14 C.F.R. §17.25\(a\).](#)**

## **Filing Limitations**

**The ODRA procedural rules require that contract disputes be filed with the ODRA within two (2) years of the accrual of the claim involved. Generally, a claim is said to "accrue" at the point in time when all facts giving rise to the claim are known. With the exception of Government warranty claims or claims for gross mistakes amounting to fraud or latent defects, neither the agency nor the contractor may file a contract dispute after final contract payment has been made by the agency and accepted by the contractor. Government warranty claims must be filed within the time limitation set forth in the contract's warranty provision. For Government claims for gross mistakes amounting to fraud or latent defects, those kinds of claims must be filed within two (2) years of the date on which the FAA knew or should have known of the presence of the fraud or latent defect. [14 C.F.R. §17.25\(c\).](#)**

## **Informal Communications**

*Parties to a contract dispute are encouraged to engage in informal discussions/communications during the first 20 business days (approximately 4 weeks) following the filing of the contract dispute with the ODRA. FAA Contracting Officers are expressly authorized by the AMS to resolve disputes by means of settlement negotiations, even after matters are brought before the ODRA, and may continue their settlement efforts up until the time the Administrator issues a Final Order for the agency at the conclusion of the Default Adjudicative Process. During the 20 business day "informal communications" period, the ODRA will make available to the parties the services of a DRO for the purpose of attempting to reach an amicable settlement via voluntary non-adjudicative ADR (informal mediation and early neutral evaluation). [14 C.F.R. §17.23\(c\)](#).*

## **Joint or Separate Statements**

*In the event parties to a contract dispute are unable to resolve their differences through informal communications within 20 business days of the filing of the contract dispute with the ODRA, they must file with the ODRA (before the expiration of that 20 day period) either:*

*(1) a joint statement requesting ADR (i.e., formal mediation or the use of adjudicative ADR techniques -- mini-trial/arbitration), in which case the statement must be accompanied by an executed ADR agreement setting forth the specific ADR methods and procedures the parties have agreed upon*

*or*

*(2) joint or separate statements indicating that ADR will not be used, in which case the statement(s) must provide a written explanation(s) as to why ADR is not being used*

See [14 C.F.R. §17.23](#) and [14 C.F.R. §17.27](#).

*The Default Adjudicative Process for contract disputes commences either:*

*-- when joint or separate statements are filed with the ODRA indicating that ADR will not be used; or*

*-- at the point when ADR fails to accomplish a complete resolution and the parties submit written notification(s) to the ODRA of this fact.*

[14 C.F.R. §17.39\(a\)](#).

## **Appointment of Fact-Finder/Status Conference**



***Within ten (10) business days after the commencement of the Default Adjudicative Process, the ODRA Director will designate a fact-finder for the purpose of initiating the Default Adjudicative Process, and the fact-finder, i.e., the DRO or Special Master, will contact the parties and will schedule and convene a Status Conference (normally telephonic) in order to define the issues to be addressed via fact-finding and to establish a schedule for discovery and for any hearings or further briefing requirements needed to conclude the fact-finding process. 14 C.F.R. §§[17.39\(c\)](#) and [\(d\)](#).***

### ***The Dispute File and Supplement; Other Written Submissions***

***Within twenty (20) business days of the commencement of the Default Adjudicative Process, the FAA Product Team will be required to compile and provide to the ODRA and the contractor a chronologically arranged and indexed Dispute File, containing tabbed documents relevant to the issues in dispute. The contractor will then be permitted, within a timeframe established by the fact-finder, to supplement the Dispute File with other documents believed to be pertinent. [14 C.F.R. §17.39\(b\)](#). The DRO or Special Master may call for additional written submissions from the parties as he/she deems necessary to complete the administrative record.***

### ***Discovery***

***In addition to the submission of documents as part of the Dispute File, the parties will be permitted to engage in focused discovery in the form of further document exchanges and possible depositions, limited in number and duration. Discovery may be done on a voluntary basis or pursuant to direction by the ODRA, where the DRO/Special Master finds, in his/her sole discretion, that it will be helpful to the development of the factual record in the case and will not unduly delay its resolution. See [14 C.F.R. §17.39\(e\)\(1\)](#). Copies of discovery materials exchanged between the parties are not to be submitted to the ODRA at the time they are produced. Such materials should only be submitted and will only be considered as part of the administrative record, if they are specifically incorporated into a party's evidentiary submission.***

### ***Hearings***

***The DRO or Special Master may decide the case on the written record, or may call for a hearing. As with protests, a hearing will ordinarily be required (1) where there are complex factual issues in dispute that cannot adequately be developed solely by means of written presentations; and/or (2) where the resolution of the dispute is dependent on the fact-finder's assessment of the credibility of statements of individuals with first-hand knowledge of the facts. The DRO/Special Master will have full discretion as to the structure and sequence of the hearing or other oral presentation. In most cases involving contract disputes, it is expected that some form of hearing will be necessary. Again, as with protests, whenever a hearing is requested by a party, one will be conducted, unless the DRO or Special Master finds specifically that a hearing is unnecessary and that no party will be prejudiced by limiting the record in the adjudication to the parties' written submissions. [14 C.F.R. §17.39\(h\)](#).***

## ***Final Written Submissions***

***Before a decision is rendered, the parties will be required to file with the DRO/Special Master and the ODRA (with copies served on the other party) final written submissions containing:***

- ***a joint statement of the issues***
- ***a joint statement of undisputed facts relating to each issue***
- ***separate statements of disputed facts relating to each issue, with citations to documents in the Dispute File, the transcripts of any depositions or hearings, and to any exhibits or affidavits which a party may wish to submit with the final written submission.***
- ***separate legal analyses in support of the parties' respective positions on issues in dispute.***

***[14 C.F.R. §17.39\(f\).](#)***

---

## ***FINDINGS AND RECOMMENDATIONS***

***Based on the proceedings and the record that has been developed in a protest or contract dispute, the DRO or Special Master will issue findings and recommendations, which are submitted to the Director of the ODRA. The Director reviews the findings and recommendations, and if he determines them to be in accord with the policy stated in the FAA Acquisition Management System (AMS) and applicable law (including prior ODRA precedent), he will endorse them and submit them to the Administrator of the FAA as the basis for a final Order. See 14 C.F.R. §§[17.37\(i\)-\(l\)](#) and [17.39\(i\)-\(l\)](#).***

***Before proceeding with any protest or contract dispute, you may want to review findings and recommendations and Orders in the ODRA cases set forth in this ODRA Website. For your convenience, the cases are not only listed alphabetically by the name of the complainant, but they have been listed and summarized by Order number, and have also been grouped alphabetically by topic. Boolean (key word) searches may also be performed for ODRA cases through use of the FAA Homepage Search function.***

***[CLICK HERE TO ACCESS THE ODRA CASE FILES](#)***

---

## ***FILING INSTRUCTIONS***

**All filings with the ODRA relating to protests or contract disputes must be addressed to the ODRA at the following address:**

**Office of Dispute Resolution for Acquisition,  
AGC-70  
Federal Aviation Administration  
800 Independence Avenue, S.W., Room 323  
Washington, D.C. 20591**

**Protests or contract disputes may be filed by regular mail, overnight delivery, hand delivery, or by facsimile. [14 C.F.R. §17.7\(a\)](#). The ODRA's telephone and facsimile numbers are as follows:**

**Telephone: (202) 267-3920  
Facsimile: (202) 267-3720**

**Because of the tight timeframes for dispute resolution before the ODRA, all filings after those initial filings may be done only by overnight delivery, hand delivery or by facsimile. [14 C.F.R. §17.7\(b\)](#). Facsimile transmission is not recommended for lengthy submissions, since the ODRA has limited facilities (currently only one fax machine) for receipt of facsimile documents. Timeliness of all filings will be measured by the time received at the ODRA offices. Filings must be received at the ODRA during its normal business hours (8 A.M. to 5 P. M. -- Eastern Time) on the date required. The risk of assuring timely receipt by the ODRA will be borne by the filer. This is particularly important to keep in mind for initial protest or contract dispute filings, since failure to make filing deadlines for those filings may be jurisdictional and may be the basis for a dismissal. See [Contact & Filing Information](#) for additional details regarding how to access the ODRA offices.**

---

## **[DISMISSAL FOR FAILURE TO PROSECUTE](#)**

**When a protester or contractor repeatedly fails to meet established filing deadlines or fails to participate in scheduled ODRA conferences, the ODRA may recommend that the protest or contract dispute be dismissed for failure to prosecute. The ODRA likewise may recommend the exclusion of an intervenor in a protest or the imposition of appropriate sanctions against the FAA Product Team for such failures on the Team's part in connection with protests or contract disputes. Accordingly, it is strongly suggested that parties first contact one another reasonably in advance of scheduled deadlines or conferences, to seek agreement on proposed schedule adjustments, whenever it appears likely that they will be unable to meet such deadlines or to participate in such scheduled conferences. The ODRA DRO or Special Master should also be notified in advance of scheduled dates regarding any proposed schedule adjustments, as to the parties' availability for alternative dates for rescheduling of conferences, and as to whether they are in agreement on requests for filing deadline extensions.**

---

## ***TIMING OF THE DEFAULT ADJUDICATIVE PROCESS***

***ODRA procedures call for the DRO or Special Master to issue findings and recommendations within thirty (30) business days of: (1) the submission of a Product Team Response, in the case of a protest; or (2) the final written submissions of the parties, in the case of a contract dispute. In most cases, findings and recommendations are submitted to the ODRA Director in a much shorter period of time. Although no times are specified for review by the ODRA Director or for the issuance of an Administrator's final Order, to date, the turnaround for these final activities has been relatively short. The overall timing for the ODRA Default Adjudicative Process has been significantly faster than parties will ordinarily experience in other federal contract forums. See [ODRA Case Management Statistics](#).***

- [\*\*\*RETURN TO THE TOP OF THIS PAGE\*\*\*](#)
  - [\*\*\*RETURN TO THE GUIDE INTRODUCTION\*\*\*](#)
- 
- 

# ***Protective Orders***

***NOTE:*** The information set forth in this section is not intended as legal advice, but merely as a description of the ODRA procedures relating to protective orders.

### **Contents:**

- [\*\*\*THE USE OF PROTECTIVE ORDERS IN THE ODRA PROCESS\*\*\*](#)
  - [\*\*\*PROTECTIVE ORDERS AND EXEMPTION 4 TO THE FOIA\*\*\*](#)
  - [\*\*\*MODEL PROTECTIVE ORDER\*\*\*](#)
  - [\*\*\*ADMISSION TO PROTECTIVE ORDERS\*\*\*](#)
  -
- 

## ***THE USE OF PROTECTIVE ORDERS IN THE ODRA PROCESS***

***In the prosecution of a procurement protest or contract dispute, a party might need to refer to***

documents or other items containing or reflecting trade secrets or confidential commercial information. The ODRA, upon request, can issue a protective order to protect proprietary, confidential, or source-selection-sensitive material, and other information which could result in a competitive advantage to another company or person. A request for a protective order may be made by any party, or may be imposed by the ODRA on its own initiative. [14 C.F.R. §17.9](#). Even in the absence of an ODRA protective order, the FAA is obligated to protect material of third parties that would ordinarily be subject to a protective order. In order to prevent unfairness, the ODRA can review such material in camera, without releasing that material to other parties.

---

## **PROTECTIVE ORDERS AND EXEMPTION 4 TO THE FOIA**

A party to a protest or a contract dispute wishing to protect its confidential information must be alert to the fact that such material can be subject to the Freedom of Information Act (FOIA) ([5 U.S.C. § 552](#)). *The FOIA will override a protective order, unless the material qualifies under Exemption 4 to the FOIA* -- the exemption pertaining to "privileged or confidential" "trade secrets and commercial or financial information." For this reason, the ODRA recommends that parties be familiar with the criteria for applying FOIA Exemption 4. Current criteria for gaining protection under Exemption 4 are discussed briefly below.

*If requested material is contained in documents generated by the FAA*, the criteria for protection of such material from FOIA disclosure under Exemption 4 are set forth in Federal Open Market Committee of the Federal Reserve, 443 U.S. 42 (1979).

*If the information and/or documents were required to be submitted to the FAA*, the party must show that their disclosure would have substantial harmful effect on the party's competitive position, and if so, what that harmful effect would be, why the effect is substantial, and the causal relationship between disclosure and the claimed harmful effect. Ordinarily, the FAA requires submission of confidential information for some purpose, such as cost analysis, technical validity, or a demonstration of compliance with specifications. The party seeking protection of such information must show concrete damage to its competitive position from the release of such information to the public, and not merely advance a vague or generalized claim of potential harm to its competitive position. See, *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

*If the information was voluntarily submitted to the FAA*, the party must show that it is the type of material that the party would not customarily release to the public, and/or that disclosure would lessen the availability to the FAA of similar information in the future. See, *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992) (en banc) cert. denied 507 U.S. 984 (1993).

---

## **MODEL PROTECTIVE ORDER**

***This Website contains an ODRA Model Protective Order that can be modified by the parties with the concurrence of the ODRA. It is based upon protective orders used by the General Accounting Office (GAO) and the General Services Administration Board of Contract Appeals (GSBCA).***

***It is suggested that you download the ODRA Model Protective Order onto your hard drive before attempting to make any modifications to it.***

## **[REVIEW THE MODEL ORDER](#)**

---

### **ADMISSION TO PROTECTIVE ORDERS**

***Use of a protective order will ordinarily require the retention of outside counsel by a protester or contractor. Because of the risk of misuse of information, pro se protesters or contractors (those proceeding without an attorney) cannot obtain access to confidential documents of other parties and other items protected by such an order, such as sensitive Government source-selection information. After a protective order has been issued, counsel or consultants retained by counsel appearing on behalf of a party may apply for admission under the order by submitting an application to the ODRA, with copies furnished simultaneously to all parties. The application establishes that the applicant is not involved in competitive decisionmaking for any firm that could gain a competitive advantage from access to the protected information and that there will be no significant risk of inadvertent disclosure of protected information. See, U.S. Steel Corp. v. United States, 730 F.2d 1465 (Fed. Cir. 1984). Objections to an applicant's admission should be raised within two days of the application, although the ODRA may consider objections raised after that time. 14 C.F.R. §17.9(c).***

***The ODRA has discussed the issue of protective orders, applications for admission under protective orders, and objections to such applications in [Protests of Camber Corporation and Information Systems & Networks Corporation, 98-ODRA-00079 and 98-ODRA-00080 \(Consolidated\) \(Interlocutory Decision on Application for Admission to Protective Order\)](#). Sample ODRA protective order application forms are included herein for review and copying.***

- **[REVIEW THE APPLICATION FORMS](#)**
  - **[RETURN TO THE TOP OF THIS PAGE](#)**
  - **[RETURN TO THE GUIDE INTRODUCTION](#)**
- 

### **PROCEDURAL TIMELINES**



## **PROTESTS**

ITEM	DUE DATE
<b>Filing of Protest Against Solicitation</b>	<b>Prior to bid opening/receipt of proposals</b>
<b>Filing of Other Protests</b>	<b>Within seven (7) business days of time protester knew or should have known of the grounds of protest <i>or</i> If a debriefing is held, within five (5) business days after the debriefing.</b>
<b>Filing of Request for Suspension of Award or Delay of Procurement</b>	<b>As part of Protest submission.</b>
<b>Product Team response to Request for Suspension</b>	<b>Within two (2) business days of filing of Request, but typically is extended until the initial status conference</b>
<b>Protester's reply to Product Team response to Request for Suspension</b>	<b>Within two (2) business days of Product Team's response</b>
<b>CO notification to ODRA of names, etc., of interested parties, and notification to awardee and other interested parties regarding the filing of the Protest</b>	<b>Immediately upon CO's receipt of a copy of the Protest</b>
<b>Request of awardee or other interested parties to intervene in the Protest</b>	<b>Within two (2) business days of their receipt of notification of the Protest</b>
<b>ODRA Status Conference – parties are encouraged to engage in "Informal Communications" to explore settlement and/or to agree on an ADR method to be employed.</b>	<b>Convened within five (5) business days of filing of Protest or as soon as practicable thereafter.</b>

Parties notify ODRA of desire for ADR via a joint statement and an executed ADR Agreement detailing desired form of ADR and the Neutral/Compensated Neutral to be used	Within five (5) business days after ODRA Status Conference.
ADR Proceedings	be complete within twenty (20) business days of filing of ADR Agreement.
"Default Adjudicative Process" Commences -- "Product Team Response" to be submitted to ODRA, protester and interested party intervenors.	Within ten (10) business days of ODRA Status Conference, if ADR is not to be used <i>or</i> in accordance with a schedule issued by the ODRA DRO or Special Master, where ADR has not been successful.
"Default Adjudicative Process" -- Comments on Product Team Response to be filed with ODRA by Protester/Interested Party Intervenor(s) with copies to other parties	Within five (5) business days of filing of Product Team Response with the ODRA <i>or</i> within five (5) business days of the party's receipt of the Product Team Response, whichever is longer.
"Default Adjudicative Process" -- Dispute Resolution Officer ("DRO") or Special Master is appointed by the ODRA Director to conduct "fact findings"	During or shortly after the ODRA Status Conference.
"Default Adjudicative Process" – discovery, hearings and submissions/briefs	All at the discretion of the DRO or Special Master
"Default Adjudicative Process" – Findings, Recommendations and Proposed Decision by DRO or Special Master	Within thirty (30) business days of commencement of "Default Adjudicative Process"



<b>ODRA review of/comments on DRO/Special Master Findings, Recommendations and Proposed Decision and forwarding of same to the Administrator</b>	<b>Unspecified</b>
<b>Administrator's Order</b>	<b>Unspecified</b>
<b>Appeal pursuant to 49 U.S.C. §46110</b>	<b>Within sixty calendar days of service of Administrator's Order</b>

### ***CONTRACT DISPUTES***

<b>ITEM</b>	<b>DUE DATE</b>
<b>Filing of Contract Dispute</b>	<b>Within two (2) years after dispute accrues</b>  <i>or</i>  <b>Before contractor's acceptance of final contract payment, if earlier.</b>
<b>"Informal Communications" – parties achieve settlement, agree on an ADR method <i>or</i> determine to utilize the "Default Adjudicative Process"</b>	<b>Within the first twenty (20) business days after contract dispute is filed.</b>
<b>File with the ODRA either: (1) a joint statement indicating the desire to use ADR, together with an executed ADR Agreement, specifying ADR techniques and whether Neutral is to be appointed by ODRA or Compensated Neutral is to be utilized; <i>or</i> (2) joint or separate statement(s) explaining why ADR will not be used.</b>	<b>By the end of the twenty (20) business day "Informal Communications" period, or within an additional twenty (20) business days, as allowed by the ODRA, where informal resolution "appears probable."</b>
<b>ADR Proceedings</b>	<b>be complete within forty (40) business days of filing of executed ADR Agreement.</b>

<b>"Default Adjudicative Process" commences and Dispute Resolution Officer ("DRO") or Special Master is appointed by the ODRA Director to conduct "fact findings".</b>	<p>Upon parties' filing with the ODRA of a joint or separate statement(s) which indicate(s) either:</p> <p>(1) that the parties will not be using ADR</p> <p><i>Or</i></p> <p>(2) that ADR has failed to achieve a complete resolution of the dispute</p>
<b>ODRA Status Conference</b>	<b>Within ten (10) business days of commencement of "Default Adjudicative Process."</b>
<b>"Default Adjudicative Process" – Product Team files "Dispute File" containing relevant documents that are chronologically arranged, indexed and separately tabbed</b>	<b>Within twenty (20) business days of commencement of "Default Adjudicative Process."</b>
<b>Contractor files any "Dispute File" supplement, containing additional relevant documents that are chronologically arranged, indexed and separately tabbed</b>	<b>At time established by the DRO/Special Master</b>
<b>"Default Adjudicative Process" – discovery, hearings and submissions/briefs</b>	<b>All at the discretion of the DRO or Special Master</b>
<b>"Default Adjudicative Process" – Findings &amp; Recommendations by DRO/ Special Master</b>	<b>Within thirty (30) business days after final submissions are filed with the DRO/Special Master and the ODRA.</b>
<b>ODRA forwards to Administrator its comments on DRO/Special Master Findings &amp; Recommendations</b>	<b>Unspecified</b>
<b>Administrator's Order</b>	<b>Unspecified</b>
<b>Appeal pursuant to 49 U.S.C. §46110</b>	<b>Within sixty days of service of Administrator's Order</b>

[TO RETURN TO THE TOP OF THIS PAGE](#)  
[RETURN TO THE GUIDE INTRODUCTION](#)

## **CONTACT & FILING INFORMATION**

**LOCATION:** *The Office of Dispute Resolution for Acquisition (the ODRA) is located in Room 323 of the FAA Headquarters Building at 800 Independence Avenue, S.W., in Washington, D.C. You can contact us as shown below:*

**BY MAIL:** *You can reach the ODRA by mail at the following address: Federal Aviation Administration, Office of Dispute Resolution for Acquisition, AGC-70, Room 323, 800 Independence Avenue, S.W., Washington, D.C. 20591. Please recognize that regular mail delivery may be delayed for a variety of reasons and allow sufficient time when mailing items to the ODRA Offices.*

**BY TELEPHONE:** *You can call Gloria L. Rosier, Assistant to the Director, at the Office of Dispute Resolution for Acquisition during working hours at **(202) 267-3290**. ODRA working hours are between 9:00 a.m. and 5:00 p.m. Eastern Standard or Daylight Time. Please be patient. The ODRA receives many calls during the day, and you may get a message. If you get a message, please leave your name, the name of your company, a short summary of your inquiry and a number where we may reply.*

**BY FACSIMILE:** *The facsimile number for the Office of Dispute Resolution for Acquisition is **(202) 267-3720**. Please note that, if your facsimile contains a document that must be received at the ODRA by a certain date, **that document must be received at the ODRA facsimile no later than 5:00 p.m. Eastern Time**. The volume of information received at the ODRA can be very high, so please allow time for busy signals.*

**BY HAND:** *The ODRA office is located in Room 323 of the FAA Headquarters Building at 800 Independence Avenue, S.W., in Washington, D.C., diagonally across from the National Air and Space Museum, and may be reached by Metrorail on either the Blue/Orange or the Green/Yellow Lines at the L'Enfant Plaza Station (7th Street and Maryland Avenue Exit). To deliver a package to the ODRA Office, you may go to the entrance of the FAA Headquarters Building and call the office at Ext. 73290. The ODRA Office is located on the third floor on the East Side of the FAA Headquarters Building around the corner from the Office of the Associate Administrator for Civil Aviation Security. All non-Government employee visitors must be escorted to the ODRA Office.*

**BY E-MAIL:** The ODRA may be reached via e-mail at the following address:  
[Marie.Collins@faa.gov](mailto:Marie.Collins@faa.gov)

**FILINGS:** All filings with the ODRA relating to protests or contract disputes must be addressed as follows:

**Office of Dispute Resolution for Acquisition, AGC-70  
Federal Aviation Administration  
800 Independence Avenue, S.W., Room 323  
Washington, DC 20591**

**Protests or contract disputes may be filed by regular mail, overnight delivery, hand delivery, or by facsimile. [14 C.F.R. §17.7\(a\)](#). The ODRA's telephone and facsimile numbers (as indicated previously) are:**

**Telephone: (202) 267-3290**

**Facsimile: (202) 267-3720**

**Because of the tight timeframes for dispute resolution before the ODRA, all filings after those initial filings may be done only by overnight delivery, hand delivery or by facsimile. [14 C.F.R. §17.7\(b\)](#). Facsimile transmission is not recommended for lengthy submissions, since the ODRA has limited facilities (currently only one fax machine) for receipt of facsimile documents. **Timeliness of all filings will be measured by the time received at the ODRA offices.** Filings must be received at the ODRA during its normal business hours (8 A.M. to 5 P.M. -- Eastern Time) on the date required. The risk of assuring timely receipt by the ODRA will be borne by the filer. This is particularly important to keep in mind for initial protest or contract dispute filings, since failure to make filing deadlines for those filings may be jurisdictional and may be the basis for a dismissal.**

- [TO RETURN TO THE TOP OF THIS PAGE](#)
  - [RETURN TO THE GUIDE INTRODUCTION](#)
-

# **AVIATION AND TRANSPORTATION SECURITY ACT**

**The following language of Section 101 of the Aviation and Transportation Security Act, Public Law 107-71, makes the FAA [Acquisition Management System \(AMS\)](#) applicable to certain TSA acquisitions and allows TSA to modify the AMS for its purposes to adopt "aspects of other acquisition management systems of the Department of Transportation":**

**(o) Acquisition Management System.--The acquisition management system established by the Administrator of the Federal Aviation Administration under section 40110 shall apply to acquisitions of equipment, supplies, and materials by the Transportation Security Administration, or, subject to the requirements of such section, the Under Secretary may make such modifications to the acquisition management system with respect to such acquisitions of equipment, supplies, and materials as the Under Secretary considers appropriate, such as adopting aspects of other acquisition management systems of the Department of Transportation.**

**[TO RETURN TO THE TOP OF THIS PAGE](#)**  
**[RETURN TO THE GUIDE INTRODUCTION](#)**

---

## **GUIDANCE FOR THE USE OF BINDING ARBITRATION UNDER THE ADMINISTRATIVE DISPUTE RESOLUTION ACT OF 1996**

**October 2001**

### **STATEMENT OF THE ADMINISTRATOR**

**As a matter of policy, the FAA is committed to the early and expeditious resolution of contract related disputes, using mediation, fact-finding, and other techniques collectively known as “alternative dispute resolution” (ADR). To further the use of ADR in our agency, this Guidance for the Use of Binding Arbitration has been issued to expand the options available to the FAA for using ADR. This Guidance,**

***which received the concurrence of the Attorney General, specifically provides that the use of binding arbitration is entirely voluntary and is to be used only when it is in the best interest of the Government. In appropriate cases, the use of binding arbitration can provide significant benefits for the agency. For example, an arbitration agreement allows the parties to limit the issues and to tailor the arbitration process according to the unique nature of the dispute; thereby reducing costs and avoiding delays in achieving a final resolution. The use of arbitration also provides greater privacy for the decision making process, and because decision makers are involved in the process of negotiating an arbitration agreement, the parties' acceptance of and compliance with the award decision is enhanced. Binding arbitration decisions generally are final and not appealable, and may be enforced by either party in court, if necessary. In sum, this Guidance will provide the FAA with yet another ADR tool to help achieve its goal of effective, efficient and fair resolution of contract related controversies, through less formal, consensual methods.***

***/s/***

**JANE F. GARVEY, ADMINISTRATOR**

---

## **INTRODUCTION**

***The Office of Dispute Resolution for Acquisition ("ODRA") of the Federal Aviation Administration ("FAA"), a modal administration of the United States Department of Transportation, proposes to utilize binding arbitration among other alternative dispute resolution ("ADR") techniques for purposes of resolving bid protests and contract disputes relating to procurements and contracts under the FAA Acquisition Management System ("AMS"). The following guidance for the appropriate use of binding arbitration was prepared for review by and coordination with the United States Department of Justice, Office of Dispute Resolution (hereinafter the "Justice Department"), pursuant to the requirement of 5 U.S.C. §575(c) that such guidance be issued "in consultation with the Attorney General" prior to an agency's use of binding arbitration. On July 26, 2001, the Attorney General concurred in the proposed guidance. Notice of the proposed guidance was published for public review and comment in the Federal Register on***

**August 27, 2001. No comments were received.**

## **Background**

**The Administrative Dispute Resolution Act of 1990, Pub. L. 101-552 (November 15, 1990), as amended by Pub. L. 102-354 (August 26, 1992) (the “ADRA of 1990”), expressly authorized the use of arbitration among several alternative dispute resolution (“ADR”) techniques available to federal agencies for purposes of dispute resolution, but specifically permitted agency heads to “opt out” of arbitration awards:**

**(c) The head of any agency that is a party to an arbitration proceeding conducted under this subchapter is authorized to terminate the arbitration proceeding or vacate any award issued pursuant to the proceeding before the award becomes final by serving on all other parties a written notice to that effect, in which case the award shall be null and void.**

**This “opt out” feature of the ADRA of 1990 – which rendered federal agency arbitrations less than “binding” – was eliminated when Congress enacted the Administrative Dispute Resolution Act of 1996 (“ADRA of 1996”), Pub. L. 104-320 (October 19, 1996), 5 U.S.C. §§571-583. The ADRA of 1996 specifically permits federal agencies to utilize “binding arbitration” to resolve “issues in controversy.” However, the ADRA of 1996 mandates as a prerequisite to agencies’ use of binding arbitration that they issue agency guidance, in consultation with the Attorney General, on the appropriate use of binding arbitration. 5 U.S.C. §575(c).**

**After the enactment of the ADRA of 1990, but prior to the enactment of the ADRA of 1996, the Congress, under the 1996 Department of Transportation and Related Agencies Appropriations Act, Pub. L. 104-50 (November 15, 1995), called for the Federal Aviation Administration (“FAA”) to develop a new acquisition management system aimed at fulfilling the agency’s unique procurement needs. Under that statute, the new FAA system was to be developed without reference to existing acquisition statutes and regulations, including, inter alia, the Competition in Contracting Act (“CICA”), the Federal Acquisition Streamlining Act (“FASA”), the Office of Procurement Policy (“OFPP”) Act, the Federal Acquisition Regulation (“FAR”) and all statutes implemented via the FAR. In the FAA’s new Acquisition Management System (“AMS”), a procurement policy document that took effect on April 1, 1996, the FAA Administrator established the Office of Dispute Resolution for Acquisition (“ODRA”), an independent office within the FAA Office of Chief Counsel, as the sole administrative forum for resolution of bid protests and contract disputes relating to procurements and contracts issued under the AMS. The ODRA has served this function since May 1996.**

**Pursuant to the AMS and supplemental delegations from the Administrator dated July 29, 1998 and March 27, 2000, the ODRA has employed ADR as its primary means of dispute**



resolution.<sup>[1]</sup> Procedures for the use of ADR are included as an integral part of the ODRA's procedural rules under Title 14 Code of Federal Regulations, Part 17. In terms of binding arbitration, the AMS had initially incorporated an "opt out" feature pursuant to the ADRA of 1990:

*If binding arbitration is agreed to, the decision of the DRO or neutral arbiter will become a final agency decision, unless the FAA Administrator indicates nonconcurrence with the decision, in writing within seven business days after the date that the decision is issued. If the FAA Administrator nonconcurs with the decision and issues a contrary determination, then that determination becomes the final agency decision concerning the merits of the protest or contract dispute.*

*AMS §3.9.3.2.3.1 (April 1996). This same language was carried over into the most current version of the AMS. See AMS §3.9.6 (September 1999). Pending the issuance of Justice Department guidance for the use of binding arbitration pursuant to the ADRA of 1996, the FAA ODRA has only authorized binding arbitration using the "opt out" procedure contemplated by the ADRA of 1990. The ODRA procedural rules, which took effect on June 28, 1999, were worded so as to accommodate both the existing procedure and anticipated Justice Department guidance on use of binding arbitration. The pertinent section of the procedural rules provides:*

*(f) Binding arbitration may be permitted by the Office of Dispute Resolution for Acquisition on a case-by-case basis; and shall be subject to the provisions of 5 U.S.C. 575(a), (b), and (c), and any other applicable law. Arbitration that is binding on the parties, subject to the Administrator's right to approve or disapprove the arbitrator's decision, may also be permitted.*

*14 C.F.R. §17.33(f). The American Bar Association ("ABA") took issue with this language as part of its comments on an earlier ODRA Notice of Proposed Rulemaking ("NPRM"). The ODRA addressed the ABA's comments in the following manner:*

#### ***Binding Arbitration***

*The ABA takes issue with the language of §17.33(f), which permits the FAA Administrator a limited amount of time within which to "opt-out" of an arbitrator's decision in binding arbitration, arguing that such a provision conflicts with the policies enunciated in the Administrative Dispute Resolution Act of 1996. Accordingly, the ABA recommends deletion of such language.*

*FAA Response: The FAA disagrees. Under 5 U.S.C. 575(c), any binding arbitration undertaken by a Federal agency must be in accordance with guidance issued by the head of the agency in consultation with the Attorney General, i.e., the Department of*



***Justice (DoJ). As of this time, DoJ has advised that federal agencies, including the FAA, may not engage in any form of binding arbitration without the kind of "opt-out" provision described in proposed §17.33(f). The language with which the ABA takes issue does not mandate this form of binding arbitration, but merely makes it a permissible form. Since any form of ADR will require the concurrence of both parties, the FAA does not see any necessity for eliminating this alternative and has not done so in the final rule. The language of the first sentence of §17.33(f) would allow for binding arbitration without such an "opt out" provision, pursuant to 5 U.S.C. 575(a), (b), and (c), so long as the arbitration process is consistent with current DoJ guidance and "applicable law." Thus, if DoJ modifies its guidance to the agencies so as to allow such binding arbitration, the FAA would not need to revise §17.33 in order to pursue such a dispute resolution option.***

***Subsequent to the issuance of the ODRA procedural rules, the Federal ADR Council under the leadership of the Attorney General approved and endorsed a publication entitled "Developing Guidance for Binding Arbitration: A Handbook for Federal Agencies," prepared by Phyllis Hanfling, Esq., Department of Energy, and Martha McClellan, Federal Deposit Insurance Corporation (hereinafter the "Handbook"), as a "blueprint" for the development of agency guidance for use of binding arbitration, as contemplated by the ADRA of 1996. The following proposed ODRA guidance for binding arbitration has been developed along the lines suggested by the Handbook, and in accordance with the recommendations set forth in Section IV of the Handbook, is being transmitted to the Justice Department's Office of Dispute Resolution for review and comment. It is the intent of the FAA, once Justice Department concurrence is obtained, to publish the proposed guidance (with whatever modifications may be suggested by the Justice Department and adopted by the FAA) in the Federal Register. The FAA is also contemplating the future issuance of guidance for the use of binding arbitration in connection with non-acquisition related disputes. In this regard, the proposed ODRA guidance is considered a first step toward establishing overall guidance for the FAA for use of binding arbitration.***

## **Overview**

***The following guidance is aimed at satisfying the requirements regarding binding arbitration specified within the ADRA of 1996 and at identifying and addressing critical issues relating to binding arbitration in a manner that is consistent with the FAA dispute resolution process, as set forth under the ODRA's procedural rules, Title 14 C.F.R. Part 17.***

\*\*\*\*\*

## **I. Statutory Requirements**

## **A. Considerations for Not Using Arbitration**

***The ADRA of 1996 calls for agencies to consider not using any form of ADR, including binding arbitration, in a number of specified circumstances. Accordingly, unless it can be established to the satisfaction of the ODRA Director that the use of binding arbitration for the resolution of a bid protest or contract dispute will be in the best interests of the Government, such an ADR technique will not be utilized whenever:***

***(1) a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent;***

***(2) the matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency;***

***(3) maintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions;***

***(4) the matter significantly affects persons or organizations who are not parties to the proceeding;***

***(5) a full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; or***

***(6) the agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances, and a dispute resolution proceeding would interfere with the agency's fulfilling that requirement.***

***See 5 U.S.C. §572(b).***

## **B. Other Statutory Requirements**

***In accordance with the ADRA of 1996, the following shall apply to all arbitrations conducted for the resolution of bid protests and contract disputes under the auspices of the ODRA:***

***1. The decision to arbitrate must be voluntary on the part of all parties to the arbitration. (See 5 U.S.C. §575(a)(1)).***

***2. A party may limit the issues it agrees to submit to arbitration. (See 5 U.S.C. §575(a)(1))***

**(A)).**

**3. A party may agree to arbitrate on the condition that the award is limited to a range of possible outcomes. (See 5 U.S.C. §575(a)(1)(B)). (Note: This provision does not contradict the requirement (set out in 4 below) that the parties agree on a maximum amount that the arbitrator can award).**

**4. An agreement to arbitrate must be in writing. It must set forth the subject matter submitted to the arbitrator, and must specify the maximum award or “cap” that may be granted by the arbitrator. (See 5 U.S.C. §575(a)(2)).**

**5. The FAA shall not require anyone to consent to arbitration as a condition of entering into a contract or obtaining any other benefit. (See 5 U.S.C. §575(a)(3)).**

**6. An officer or employee of the FAA who offers to use arbitration must otherwise have the authority to enter into a settlement concerning the matter or must be specifically authorized to consent to the use of arbitration. (See 5 U.S.C. §§575(b)(1) and (2)).**

**7. The selection of the arbitrator shall be upon mutual agreement of the parties. (See 5 U.S.C. §577(a)). In accordance with Title 14 C.F.R. Part 17, Subpart D, the parties may elect to have the ODRA Director designate an ODRA Dispute Resolution Officer (DRO) to serve as the arbitrator. In the alternative, they may request that the ODRA attempt to make qualified non-FAA personnel available to serve as an arbitrator, through neutral-sharing programs and other similar arrangements. Finally, the parties may elect to employ a mutually acceptable Compensated Neutral (as defined under 14 C.F.R. §17.3(f)) as the arbitrator, if the parties agree as to how the costs of any such Compensated Neutral are to be shared. In no event shall the arbitrator have an official financial or personal conflict of interest with respect to the issue in controversy, unless that interest is fully disclosed in writing and all parties agree that he/she may serve as the arbitrator. (See 5 U.S.C. §§573, 577(b)).**

**8. An arbitrator may regulate the course and conduct of the arbitration hearing. (See 5 U.S.C. §578(1)).**

**9. An arbitrator may administer oaths and affirmations. (See 5 U.S.C. §578(2)).**

**10. An arbitrator may compel the attendance of witnesses and the production of documents. (See 5 U.S.C. §578(3)).**

**11. An arbitrator may make awards. (See 5 U.S.C. §578(4)).**

**12. The arbitrator shall set the time and place for the arbitration hearing and shall notify**

***the parties of same at least five days before the hearing is to take place.***

***13. Parties are entitled to a record of the arbitration hearing. Any party wishing a record shall: (1) make the arrangements for it; (2) notify the arbitrator and other parties that a record is being prepared; (3) supply copies to the arbitrator and the other parties; and (4) pay all costs, unless the parties have agreed to share the costs. (See 5 U.S.C. §§579(b)(1)-(4)).***

***14. At any arbitration hearing, parties are entitled to be heard and present evidence. (See 5 U.S.C. §§579(c)(1) and (2)).***

***15. The arbitrator may hear any oral and documentary evidence that is not irrelevant, immaterial, unduly repetitious, or privileged. (See 5 U.S.C. §579(4)).***

***16. The arbitrator shall interpret and apply any relevant statutes, regulations, legal precedents and policy directives. (See 5 U.S.C. §579(5)).***

***17. No party shall have any unauthorized ex parte communication with the arbitrator. If a party violates this provision, the arbitrator may require that party to show cause why the issue in controversy should not be resolved against it for the improper conduct. (See 5 U.S.C. §579(d)).***

***18. The arbitration award for protests shall be made within twenty (20) business days from the filing of an executed ADR agreement with the Office of Dispute Resolution for Acquisition, unless the parties request, and are granted, an extension of time from the Office of Dispute Resolution for Acquisition. For contract disputes, the arbitration award shall be made within forty (40) business days from the filing of an executed ADR agreement with the Office of Dispute Resolution for Acquisition, unless the parties request, and are granted, an extension of time from the Office of Dispute Resolution for Acquisition. (See 5 U.S.C. §§579(e)(1) and (2); 14 C.F.R. §§17.33(g) and (h)).***

***19. An arbitration award shall include a brief informal discussion of the factual and legal basis for the award. Formal findings of fact and law are not required. (See 5 U.S.C. §580(a)(1)).***

***20. A final award is binding on the parties and may be enforced pursuant to sections 9 through 13 of Title 9, U.S. Code. (See 5 U.S.C. §580(c)).***

***21. An arbitration award may not serve as an estoppel in any other proceeding and may not be used as precedent in any factually unrelated proceeding. (See 5 U.S.C. §580(d)).***

***22. Any action for review of an arbitration award must be made pursuant to sections 9***

*through 13 of Title 9, U.S. Code. (See 5 U.S.C. §581(a)).*

*23. Arbitration shall be subject to judicial review under section 10(b) of Title 9, U.S. Code, for evident partiality or corruption of the arbitrator(s). (See 5 U.S.C. §581(b)).*

## ***II. Binding Arbitration Guidance***

### ***A. The ADR Spectrum***

*ADR processes, as defined in 5 U.S.C. §571(3) include, but are not limited to, conciliation, facilitation, mediation, fact-finding, ombuds, mini-trials, and arbitration. ADR processes are generally designed to reduce costs, avoid the delays of judicial proceedings, protect the privacy of the parties and increase the level of compliance by involving decision makers in the process. The FAA Associate Administrator, Research and Acquisitions (ARA), and Procurement Executive has executed an ADR Pledge, committing the agency to using ADR in appropriate cases for the resolution of issues in controversy relating to FAA acquisitions. ADR is viewed by the FAA as an indispensable tool for accomplishing its overall mission in the most productive and efficient manner. The FAA, through the Office of Dispute Resolution for Acquisition, has successfully resolved the majority of bid protests and contract disputes under the AMS by means of ADR. ADR is the primary focus of dispute resolution for the ODRA. The forms of ADR employed by the ODRA have been consensual for the most part, principally facilitative mediation and neutral evaluation. Consensual forms of ADR are clearly preferred by the FAA as a general matter. However, as noted above, the ODRA's procedural rules contemplate the availability of binding arbitration, in the event parties desire to utilize that form of ADR to resolve a particular dispute.*

### ***B. Binding Arbitration: Description and Forms***

*The ODRA will administer a form of binding arbitration that the parties select for the purpose of resolving a bid protest or contract dispute. Binding arbitration is said to be the dispute resolution process most like adjudication. In binding arbitration, the parties agree to use a mutually selected decision-maker to hear their dispute and resolve it by rendering a binding decision or award. In the case of bid protests or contract disputes before the ODRA, the parties' decision to arbitrate or to utilize another form of ADR will be made immediately after the case is docketed by the ODRA. See 14 C.F.R. §§17.17 and 17.27.*

*Like litigation, binding arbitration is an adversarial, adjudicative process designed to resolve the specific issues submitted by the parties. Binding arbitration differs significantly from litigation in that it does not require conformity with the legal rules of evidence, and the proceeding is conducted in a private rather than a public forum.*

***Binding arbitration awards typically are enforceable by courts, absent defects in the arbitration procedure. Appeal from such awards, pursuant to the Federal Arbitration Act, 9 U.S.C. §10, is generally limited to fraud or misconduct in the proceedings.***

***Binding arbitration may also be used in conjunction with mediation in several ways:***

- It may be part of a mediation/arbitration (so-called “med/arb”) proceeding, where the parties attempt to mediate the dispute first. Failing resolution, the same neutral arbitrates and issues a binding award. Using the same person as both mediator and arbitrator may have a chilling effect on full participation in mediation, as a party may not believe that the arbitrator will be able to discount unfavorable information learned during the mediation.***
- In co-mediation/arbitration, two neutrals preside over the initial joint session. After that, the neutral designated as the mediator works with the parties. Failing settlement, the case, or any unresolved issues, may be submitted to the neutral designated as the “arbitrator,” for a binding decision.***
- Arbitration/mediation is another way to avoid the problem of one neutral serving as both mediator and arbitrator. The arbitrator hears the case and renders a written determination that is not disclosed to the parties. He or she then attempts to mediate, with the understanding that if the parties reach no settlement, his/her earlier determination will become the award.***

### **C. Setting the Award “Cap”**

***In terms of the ADRA’s mandatory requirement for establishing an award “cap”, in addition to negotiating a maximum award (“cap”), the parties might consider agreeing to a minimum award prior to arbitration, using the “High-Low” method as described in the Handbook:***

***High-Low. The parties agree privately without informing the arbitrator that the final award will be within certain parameters. At the conclusion of the hearing, if the arbitrator’s award is within the agreed upon range, the parties are bound by that figure. If, however, the award is outside the parameters, it is adjusted accordingly. For example, if the high-low figures were \$50,000 and \$100,000 and the award was \$25,000, it would be adjusted to \$50,000. Similarly, if the award were \$250,000, it would be adjusted to \$100,000.***

### **D. The Checklist of Arbitration Issues**

***The following responds to each of the substantive issues identified in the Handbook as***

***“substantive issues to consider.”***

***Issue 1: For what types of cases will the agency be willing to use binding arbitration?***

***Response: The FAA is willing to consider the use of binding arbitration for the resolution of any issue in controversy involving a bid protest or contract dispute, where the aforesaid specified circumstances under the ADRA (i.e., for considering non-use of ADR) are not involved. (See I.A. above).***

***Issue 2: Will the FAA agree to arbitrate issues other than money, e.g., specific performance, punitive damages, injunctive relief, apportionment of fees?***

***Response: Because established case law provides that an award of punitive damages against the Government would be a violation of sovereign immunity, the FAA will not agree to having such damages as part of any arbitration award under the ODRA dispute resolution process. On the other hand, non-monetary relief may be and frequently is necessary for the proper resolution of bid protests, e.g., directed cancellations of, or amendments to solicitations or ordered terminations for the convenience of the Government and/or directed contract awards. In such protest cases, should the arbitrator conclude that non-monetary relief is appropriate, the arbitrator’s authority would be limited to recommending to the ODRA Director and the Administrator that such relief be granted. The resolution of contract disputes also may entail the need for declaratory or equitable relief. Where declaratory relief is needed, the arbitrator may be authorized to grant such relief. The arbitrator may be authorized to recommend other forms of equitable relief, such as specific performance. If either party contemplates the need for non-monetary relief, it is strongly suggested that the issue of such relief be addressed specifically as part of the parties’ Arbitration Agreement.***

***Issue 3: How and by whom will the decision to arbitrate be made?***

***Response: The decision to arbitrate is strictly that of the parties to the bid protest or contract dispute. As with any other form of ADR, arbitration must be a completely voluntary process. Within the FAA, a decision to arbitrate will be made by the FAA Product Team. Under the AMS, Product Teams are given considerable independent authority and are to operate by consensus. An FAA Product Team ordinarily consists of a Contracting Officer, one or more program officials, and a Product Team Counsel who is a representative of the FAA Office of Chief Counsel.***

**a. Who will have authority to recommend arbitration?**

**Response:** *Arbitration may be recommended by a party or by the ODRA.*

**b. Who has the authority to enter into settlement? Can this authority be delegated?**

**Response:** *Generally, it will be the Contracting Officer who will have authority to execute a settlement agreement on behalf of the FAA. His/her authority might be delegable to another member of an FAA Product Team, so long as the individual holds an appropriate warrant.*

**c. Who will negotiate the cap on the award?**

**Response:** *Negotiation should ordinarily involve the Contracting Officer. It is expected that Product Team Counsel will participate in any negotiation.*

**d. Who will negotiate the rules and selection of the arbitrator?**

**Response:** *The parties must mutually agree upon the arbitrator and will have several options from which to choose, including: (1) an ODRA Dispute Resolution Officer (DRO); (2) a Board of Contract Appeals Judge from the General Services Administration Board of Contract Appeals (GSBCA) or other non-FAA federal employee made available to the ODRA for purposes of serving as an ADR Neutral under the terms of an interagency agreement with the FAA; and (3) a Compensated Neutral from outside the Government, whose costs are to be shared by agreement of the parties. For the FAA, the decision regarding selection of the arbitrator will be that of the FAA Product Team. The procedural rules that will govern any binding arbitration are to be established by the parties, preferably with input from the arbitrator whom they select, and should be memorialized as part of the Arbitration Agreement.*

**e. Who will draft the Agreement to Arbitrate?**

**Response:** *The Agreement will be drafted by the parties, ordinarily by their respective counsel with the assistance of an ODRA Dispute Resolution Officer (DRO)[\[2\]](#), if desired, and preferably with substantive input from the selected arbitrator.*

<b>Issue 4: What will the process be for entering into arbitration?</b>
---

**Response:** *As described above, the process for entering into arbitration in an ODRA proceeding is an informal process assisted by a designated ODRA DRO and one that is contemplated by the ODRA procedural rules.[\[3\]](#) An FAA Product Team has complete*



**delegated authority from the Administrator under the AMS to resolve acquisition related disputes at the lowest possible level and to employ ADR techniques whenever appropriate. As a member of the Product Team, the FAA Contracting Officer, depending on the extent of his/her warrant, is authorized to execute Arbitration Agreements, provided he/she ascertains first that sufficient funds will be available to cover the maximum possible award against the FAA and second that the circumstances of a case are such that binding arbitration would not be precluded under the guidance of Section I. A. hereinabove and/or would serve the best interests of the Government. Under the FAA's system, no justification of binding arbitration for approval by a higher level within the agency is required. Accordingly, in lieu of any Request to Arbitrate, the Product Team's Counsel, with the assistance of other Team members as appropriate, will be required to prepare a Memorandum of Counsel for the Contracting Officer, in order to document Counsel's evaluation of the merits of the case and the rationale for any election to submit the matter to binding arbitration. This Memorandum of Counsel, which shall be maintained in the Product Team's files, shall not be made part of any administrative record, shall not be used in the arbitration, and shall carry whatever privileges regarding non-disclosure and non-admissibility may attach to such documents.**

**Issue 5: What should the Memorandum of Counsel include?**

**Response: The following information should be included:**

**Facts & Analysis - A presentation of the factual bases, legal reasons, and policy considerations supporting the decision to use binding arbitration to resolve the particular dispute, including:**

- A detailed description of the facts underlying the controversy, and an identification of the disputed issues and the current status of the matter.**
- A litigation risk analysis.**
- A statement that none of the circumstances specified in 5 U.S.C. §572(b) are present, such that ADR might not be advisable. See Section I.A. above. In the alternative, a statement as to why ADR is advisable and in the best interests of the Government, notwithstanding the existence of such circumstances.**
- A description of how binding arbitration was initiated in the present case.**
- An explanation of why forms of ADR other than binding arbitration are not feasible for**

**resolution of the issue(s) in controversy, including a description of all consensual forms of ADR that have been offered or attempted and the outcome and a statement as to why further attempts with consensual approaches are inappropriate or impractical. (Note: The foregoing explanation would be obviated if binding arbitration were coupled with mediation – e.g., using a “med-arb” approach – or some other consensual ADR technique.)**

- **A detailed cost/benefit analysis of arbitration versus litigation –**

- o **For arbitration: (1) an arbitration timeline (to include the time needed to negotiate and finalize the Arbitration Agreement as well as the time for discovery, submissions of writing presentations, and the hearing); (2) the arbitrator’s fees and expenses; (3) agency personnel costs; (4) any fees for using outside counsel; (5) travel and transportation costs associated with discovery and hearing; (6) any transcript costs; and (7) other estimated expenses (including reproduction, equipment rental, etc.)**

- o **For litigation: (1) a litigation timeline (to include time for any appeal); (2) agency personnel costs; (3) any fees for using outside counsel; (4) travel and transportation costs associated with discovery, hearing and any appeal; (5) any transcript costs; and (6) other estimated expenses (including reproduction, equipment rental, etc.)**

**Maximum Award - Identification of the proposed maximum award (“cap”) and the funding available to cover that maximum.**

<b>Issue 6: How can the FAA encourage the efficiency of the arbitration process?</b>
--

**Response: In all but rare exceptions (see Issue 11, below), only single arbitrators (rather than panels of arbitrators) will handle ODRA bid protests and contract disputes. Arbitrators operating under the auspices of the ODRA shall employ the following measures, with the parties’ consent and cooperation, in order to assure maximum efficiency of the arbitration process:**

**A. Limit the scope of discovery**

**B. Establish reasonable deadlines for discovery, the hearing, and rendering of an award, consistent with the timeframes specified in the ODRA procedural rules for completion of ADR - i.e., for bid protests, 20 business days from the parties’ submission to the ODRA of the ADR (Arbitration) Agreement; and for contract disputes, 40 business days from the date of such submission, subject to extensions by the ODRA for cause. See 14 C.F.R. §§17.33(g) and (h). These timeframes shall be incorporated into the Arbitration**

**Agreement. Specify therein also that the arbitration award shall be final when served and that service must be effected by means of certified mail, return receipt requested. In accordance with the ADRA of 1996, the award will be enforceable 30 days after service on all parties. See 5 U.S.C. §580(b).**

**C. Limit the number of witnesses.**

**D. Resolve the controversy or individual issues by means of document review or by arbitration via telephone conference in appropriate cases.**

**Issue 7: How and by whom will outside requests for binding arbitration be accepted?**

**Response: As noted previously, at the inception of the ODRA's processing of a bid protest or contract dispute, an ODRA DRO will be designated by the ODRA Director to explore with the parties all ADR options, including binding arbitration. A party (whether the FAA Product Team or a contractor or offeror) wishing to utilize binding arbitration will be provided with the opportunity to request this means of dispute resolution at that juncture. If the parties agree to using binding arbitration, they will be required to furnish a written Arbitration Agreement for review and approval by the ODRA Director in accordance with a time schedule established during the parties' initial status conference with the Director. The Director will review any such Agreement to assure compliance with the ADRA of 1996 and the guidance herein.**

**Issue 8: Will the FAA allow arbitration clauses to be written into contracts?**

**Response: This has not been and will not be the FAA practice under the AMS. Instead, the standard "Disputes" clause makes all bid protests and contract disputes subject to the ODRA Dispute Resolution Process, as set forth in Title 14 C.F.R. Part 17. Arbitration will not be mandated by contract clause or otherwise, but will be considered as one of many ADR options in the manner previously described.**

**Issue 9: If the agency allows arbitration clauses in contracts, what should be included in the clause?**

**Response: Not applicable. See Response to Issue 8, above.**

**Issue 10: What is the arbitrator's role under the ADRA?**

**Response:** *As specified in Section I.B. hereinabove, the provisions of the ADRA will apply to arbitrations of bid protests and contract disputes administered by the FAA ODRA. As such, the arbitrator will have, inter alia, the authority to:*

- *Regulate the course and conduct of arbitration hearings;*
- *Administer oaths;*
- *Compel attendance of witnesses and production of evidence, to the extent that the agency is authorized to do so by law*[\[4\]](#)*;*
- *Issue awards.*

*It is suggested that the parties, as part of their Arbitration Agreement, spell out any specific further powers they wish the arbitrator to have, and further afford the arbitrator broad discretion in terms of efficient case management.*

**Issue 11:** *Will the ODRA permit the use of a panel of arbitrators in some circumstances?*

**Response:** *In only rare circumstances would the ODRA permit more than a single arbitrator to be utilized. Because of the cost attendant to compensating an arbitration panel, the issue(s) in controversy would have to involve significant dollar amounts. Further, the matter would have to be of such technical complexity that no single arbitrator would have sufficient expertise or experience to be able to resolve the matter.*

**Issue 12:** *What selection criteria will be considered in choosing an arbitrator?*

**Response:** *The ADRA allows an agency to use, with or without reimbursement, the services and facilities of other Federal agencies, State, local and tribal governments, public and private organizations and agencies, and individuals, with the consent of such agencies, organizations, and individuals, and without regard to the provisions of 31 U.S. C. §1342 (regarding the acceptance of voluntary services). The ADRA permits selection of all ADR neutrals, including arbitrators, to be done non-competitively. In terms of any arbitrator, the individual must be acceptable to both the FAA and other parties involved in a bid protest or contract dispute. As noted above, the ODRA provides as options for ADR neutrals three categories of individuals: (1) ODRA Dispute Resolution Officers (DROs); (2) Board of Contract Appeals Judges from the General Services Administration Board of Contract Appeals (GSBCA) or other non-FAA federal employees made available*

**to the ODRA for purposes of serving as an ADR Neutral under the terms of an interagency agreement with the FAA; and (3) Compensated Neutrals from outside the Government, whose costs are to be shared by agreement of the parties. Among the primary criteria for selection of an arbitrator would be: (1) overall reputation of the arbitrator in terms of competence, integrity, and impartiality; (2) degree of expertise and experience in Government contract law and with the FAA Acquisition Management System; (3) degree of expertise and experience with the subject matter/ technical issues involved in the controversy; (4) availability of the arbitrator during the periods most convenient for the parties; (5) geographic proximity of the proposed arbitrator to the parties and to witnesses; (6) relative cost; and (7) the absence of any actual or potential conflict of interest. To the extent rosters of qualified arbitrators are developed, these should be consulted. The ODRA DRO designated by the ODRA Director to explore ADR options with the parties will be available to facilitate an agreement on arbitrator selection.**

**Issue 13: Will the agency agree to allow non-attorneys to represent a party, or for a party to appear pro se at the arbitration?**

**Response: Yes. The ODRA Dispute Resolution Process has been designed so that it is readily accessible to small business enterprises and other entities or individuals that wish to prosecute bid protests or contract disputes without representation of counsel. To that end, the ODRA Website ([http://wwwtest.faa.gov/about/office\\_org/Headquarters\\_offices/agc/pol\\_adjudication/agc70/](http://wwwtest.faa.gov/about/office_org/Headquarters_offices/agc/pol_adjudication/agc70/)) contains a plain language Guide, a listing of standard forms, and a library of all of the ODRA's case decisions, with case summaries, topical and case name indexes, and a key word search capability. As a result, more than half the cases docketed by the ODRA to date have been prosecuted by contractors on a pro se basis. (See [http://wwwtest.faa.gov/about/office\\_org/Headquarters\\_offices/agc/pol\\_adjudication/agc70/ODRA\\_Process/view/Case\\_Management\\_Statistics.pdf](http://wwwtest.faa.gov/about/office_org/Headquarters_offices/agc/pol_adjudication/agc70/ODRA_Process/view/Case_Management_Statistics.pdf)). Before approving any Arbitration Agreement entered into by an unrepresented party, the ODRA Director will ascertain that the party is aware of the risks and limitations inherent in any arbitration and of the advantages that may be offered by consensual forms of ADR, such as retaining control of the dispute resolution outcome and preservation of cordial business relations with the agency.**

**Issue 14: What should an Arbitration Agreement include?**

**Response: In accordance with the Handbook, the Agreement should include the following:**

- 1. The names of the parties.**

- 2. The issues being submitted to binding arbitration. The parties can submit all or only certain issues in controversy to binding arbitration.**
- 3. The maximum award (“cap”) that the arbitrator may direct. (Note: The parties must be negotiated such a maximum prior to signing the Agreement. The “cap” amount and any negotiated “low” value (should the parties adopt the aforementioned “High-Low” method) should be redacted from the document prior to presenting it to the arbitrator, if the parties wish not to disclose it.)**
- 4. Any other conditions limiting the range of possible outcomes.**
- 5. The scope of the arbitration. This will limit time and cost and give the arbitrator power to be a “case manager.” A sample case management provision might read:**  
  
**“The Arbitrator is expected to assume control of the process and to schedule all events as expeditiously as possible, to insure that an award is issued no later than \_\_\_\_ days from the date of this Agreement.”**  
  
**[Note: Although the Arbitrator will have ultimate authority, it is the ODRA’s intention that the parties retain some control over the arbitration schedule. Thus, whereas the ODRA procedural rules provide for completion of any ADR, including arbitration, within 20 business days for protests; and within 40 business days for contract disputes, the ODRA Director may extend such timeframes upon request of either the parties or the Arbitrator, or both.]**
- 6. References to all provisions of the ODRA procedural rules regarding discovery and the conduct of hearings that the parties may wish to apply to the arbitration process.**
- 7. The name of the arbitrator, the amount of compensation and how it will be paid. (Note: No Agreement shall provide for deposits in an escrow account to pay for expenses of the proceeding in advance of expenses being incurred.)**
- 8. The date when the arbitration will commence.**
- 9. The types of remedies available.**
- 10. A confidentiality provision invoking the ADRA of 1996 and stating that neither the Agreement nor the arbitration award will be considered confidential.**

**Sample Arbitration Agreements for bid protests and contract disputes are appended hereto as Addenda 1 and 2.**



**Issue 15: How will the agency pay the arbitrator(s)?**

**Response:** Generally, the parties will agree in advance to share any arbitrator fees and costs, the costs of any transcripts, etc., all of which will be paid after the award is issued. The Government may not escrow funds or pay in advance for any such costs.

**Issue 16: Is the FAA willing to use “administered arbitration”?**

**Response:** No. All ADR relating to FAA bid protests and contract disputes is to be administered by the ODRA and not by an outside ADR organization.

**Issue 17: What must the arbitration award include?**

**Response:** The arbitration award need not be in the form of formal findings of fact and conclusions of law, but must at least provide in summary form the monetary amount of the award, if any, and the factual and legal basis for the arbitrator’s decision. The award will be subject to the “cap” and any other limitations agreed upon by the parties. Arbitration awards will not be treated as confidential documents.

**Issue 18: Will the agency allow arbitration on the documents only, without a hearing, or a telephonic hearing? If so, in what circumstances?**

**Response:** In simple, low dollar amount, cases, or with respect to individual issues, the parties will be authorized to agree to have the arbitrator render an award based solely on his/her review of the documents or based on telephonic testimony. The Arbitration Agreement should specify which issues are to be handled in such manners. The Agreement should also allow the arbitrator discretion to call for live face-to-face testimony on any such issues, should he/she determine that credibility may be a factor in the ultimate decision on those issues.

**Issue 19: What selection criteria will be considered in choosing or amending arbitration rules and what must those rules include?**

**Response:** The only rules applicable to the conduct of arbitration under the auspices of the ODRA are the rules pertaining to ADR generally under the ODRA’s procedural rules in Title 14 C.F.R. Part 17. Those rules will not be amended, unless the ODRA desires to modify its overall ADR practices. There are no specific rules governing arbitration, per

*se. Accordingly, the conduct of any given arbitration will be left to the parties and the arbitrator and should be set forth with adequate particularity within the Arbitration Agreement. Whatever rules are set forth in the Agreement should be aimed at obtaining an expeditious and impartial resolution of the matters at issue. Simpler cases usually will require less in terms of process (i.e., more tailored discovery and more abbreviated hearings) than cases that are more complex. The ODRA Director must approve the terms of any Arbitration Agreement before arbitration can proceed. The Director's review, among other things, will be to assure that the Agreement conforms to the provisions of the ADRA of 1996.*

---

**[1]** *As of September 5, 2000, the ODRA had completed 116 bid protests. Of those, 63 protests (54%) were resolved by means of ADR techniques. Of the 41 contract disputes completed as of July 1, 2000, 34 (83%) were resolved by means of ADR techniques.*

**[2]** *The ODRA's practice immediately upon receipt of a bid protest or contract dispute is for the ODRA Director to designate a DRO to assist the parties with exploring possibilities for resolution by means of ADR. This DRO – who may or may not ultimately be selected as an ADR Neutral – will present for the parties' consideration various ADR techniques, including binding arbitration. The ODRA procedural rules require that the parties file with the ODRA written statements as to whether ADR will be employed and, if so, they further mandate the submission of a written ADR Agreement. 14 C.F.R. §§17.17, 17.27, and 17.33. If the parties elect to use binding arbitration, the Agreement will be an Arbitration Agreement. Ordinarily, the designated DRO will offer to assist the parties in drafting the ADR Agreement and frequently, to expedite the process, will provide them with a proposed Agreement based on standard forms mounted on the Internet as part of the ODRA's Website ([http://www.faa.gov/about/office\\_org/Headquarters\\_offices/agc/](http://www.faa.gov/about/office_org/Headquarters_offices/agc/)). These forms have been modified to conform to the guidance herein, and copies are appended hereto as Addenda 1 and 2.*

**[3]** *See Note 2, above.*

**[4]** *Under the FAA's "Organic Statute," 49 U.S.C. 46101, et seq., the Administrator, in conjunction with the conduct of adjudications, has the authority to subpoena witnesses and documents. This authority has been delegated by the Administrator to the ODRA Director by Memorandum dated July 29, 1998, which has been published at the ODRA Website ([http://www.faa.gov/about/office\\_org/Headquarters\\_offices/agc/](http://www.faa.gov/about/office_org/Headquarters_offices/agc/) under "Delegations"). Such authority is further delegable to ODRA DROs and Special Masters. For purposes of arbitration under the ODRA Dispute Resolution Process, the arbitrator*



**will be considered a “Special Master” and , as such, will have such delegated authority.**

- [RETURN TO THE TOP OF THIS PAGE](#)
  - [RETURN TO THE GUIDE INTRODUCTION](#)
- 

**Federal Aviation Administration  
Office of Dispute Resolution for Acquisition**

**Washington, D.C. 20590**

Protest of \_\_\_\_\_

Pursuant to Solicitation \_\_\_\_\_

ODRA Docket No. \_\_\_\_\_

**PROTECTIVE ORDER**

*This protective order limits disclosure of certain material and information submitted in the above-captioned proceeding before the Federal Aviation Administration Office of Dispute Resolution for Acquisition (“ODRA”), so that no party obtaining access to protected material under this order will gain a competitive advantage as a result of the disclosure. Material to which parties gain access under this protective order is to be used only for the above referenced protest, absent express prior authorization from the ODRA. Such authorization must be in writing, with notice to all parties.*

- 1. This protective order applies to all material that is identified by any party as protected, unless the ODRA specifically provides otherwise. This protective order applies to all written submissions associated with the instant proceeding, and to oral communications where reference to information contained within the protected material might be made.*
- 2. Nothing in this protective order shall be construed to prohibit the disclosure by any federal agency of materials covered by the protective order to other appropriate persons within the federal government, nor shall anything in this order render inapplicable any statutory or regulatory limitations on such disclosure that may otherwise exist.*
- 3. This protective order does not prevent a party from asserting any legally cognizable privilege to withhold any document or information.*
- 4. Counsel must file an Application for Access To Materials Under Protective Order before the ODRA will permit him/her to view protected material. Any objection to granting an applicant access to*

*protected material must be filed within two business days after an application for access is filed with the ODRA. Counsel is entitled to view protected material only after the ODRA issues an order granting his/her application for access.*

*5. The ODRA will not permit an expert or consultant appearing for a party to view protected material unless the person files an application for access to protected material. The person will not be granted access if he or she is employed by a party to the action, or is working under contract to such a party. Objections to granting an expert or consultant access to protected material must be filed within two business days after the application is filed with the ODRA. An expert or consultant is entitled to view protected material only after the ODRA issues an order granting an application for access.*

*6. Protected material of any kind may be provided only to the ODRA and to individuals authorized by this protective order, and must be either (a) provided in a sealed parcel containing the legend "PROTECTED MATERIAL ENCLOSED" conspicuously placed on the outside of the parcel containing the protected information, or (b) transmitted via facsimile accompanied by a header sheet containing the legend 'PROTECTED MATERIAL ENCLOSED' in large conspicuous type. The first page of each document containing protected material is to be clearly marked as follows:*

**PROTECTED MATERIAL**

**BE DISCLOSED ONLY IN ACCORDANCE WITH**

**OFFICE OF DISPUTE RESOLUTION FOR ACQUISITION**

**PROTECTIVE ORDER**

*The party claiming protection must clearly identify the specific portion of the material for which it is claiming protection. Whenever protection is claimed for a pleading, the party filing the pleading shall submit a proposed redacted version for public release when the protected version is filed.*

*7. Only individuals who are admitted under this protective order by the ODRA, and support staff (paralegal, clerical, and administrative personnel) who are employed or supervised by individuals admitted under this order, and who are not involved in competitive decisionmaking for a party to this proceeding or for any firm that might gain a competitive advantage from access to the protected material disclosed under this order, shall have access to information covered by this order. Individuals admitted under this protective order shall advise such support staff, prior to providing them access to protected material, of their obligations under this order.*

*8. Each party included under this protective order shall receive and maintain, at the offices of its lead counsel, no more than one copy of the protected material and shall not create additional copies except as: (a) incidental to a submission to the ODRA; (b) required for preparing redactions to protected material; or (c) otherwise agreed by the parties with the ODRA's prior concurrence.*

9. When any party sends or receives documents in connection with this protest that are not designated as protected, including proposed redacted versions of protected documents, the party shall refrain from releasing the documents to anyone not admitted under this protective order, including clients, until the end of the second day following receipt of the documents by all parties. This practice permits parties to identify documents that should have been marked protected before the documents are disclosed to individuals not admitted under this protective order.

10. Each individual covered under this protective order shall take all necessary precautions to prevent disclosure of protected material, including, but not limited to physically securing, safeguarding, and restricting access to the protected material. The confidentiality of protected material shall be maintained in perpetuity.

11. Should a party oppose any requested protection, it must submit a written challenge to the material to the ODRA, the party seeking protection, and all other parties, within two working days of receiving the material marked for protection. The party seeking the protection must submit a written response to the challenge to the ODRA and the opposing party within one working day of receipt of opposition. The ODRA will then rule on the challenge and response. Until the ODRA rules on the challenge and response, the material shall be deemed protected subject to this protective order. If the ODRA receives no opposition to material marked as protected or claimed to be protected, it will be deemed protected subject to this protective order unless otherwise ordered by the ODRA.

12. Within seven calendar days after the conclusion of this protest, all documents in a party's possession that contain protected material and all copies thereof shall be (1) returned to counsel for the party or witness who produced them, or (2) with the prior written agreement of the party which generated the protected material, destroyed and certified as destroyed to counsel for the party or witness who produced them. Transcripts of proceedings and briefs shall be destroyed in accordance with the instructions above. For purposes of this paragraph, the conclusion of the protest may be by settlement, or by a judgment that has become nonappealable.

13. Any allegations of abuse or violation of this order will be considered by the ODRA. If an allegation of abuse or violation of the protective order is found, the ODRA may refer the matter to the appropriate United States Attorney for violation of 18 U.S.C. § 1001 with respect to the terms agreed to in the Application for Access To Materials Under Protective Order, and additionally, in the case of attorneys, the ODRA may refer the matter to the appropriate bar association for disciplinary proceedings.

Effective Date of this Protective Order: \_\_\_\_\_

FAA Office of Dispute Resolution for Acquisition

---

*Anthony N. Palladino, Director*